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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND ITS LOCAL 304A
Petitioners,

v.

JOHN MORRELL & CO.,
Respondent.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 89-5109, 89-5152

JOHN MORRELL & COMPANY,
Appellee,
v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC; DENNIS FOSTER, Individually and in his capacity as president of defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of defendand Local 304A; JOHN DOE and OTHER PERSONS UNKNOWN,
Appellants.

JOHN MORRELL & COMPANY, a corporation,
Appellee,
v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO and CLC; UNITED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC,
Appellants.

Submitted Dec. 13, 1989

Decided Sept. 7, 1990

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Unions representing workers at John Morrell & Company's plant in Sioux Falls, South Dakota appeal a $24.6 million jury award entered against them in favor of Morrell. The jury found that the Unions had breached the no-strike clause of the parties' collective bargaining agreement by engaging in sympathy strikes. The district court,[1] 708 F.Supp. 273, entered judgment for Morrell and also vacated an arbitration award, issued between the liability and damages phases of the bifurcated jury trial, that had held that the no-strike clause did not bar sympathy strikes. The Unions now appeal and argue that the district court erred by: (1) submitting the issue of whether the collective bargaining agreement prohibited sympathy strikes to the jury; (2) making various rulings during the damages phase of the trial; and (3) vacating the arbitration award. We affirm the judgment of the district court.

Morrell operates a meat packing business and has plants at various locations, including Arkansas City, Kansas; Sioux City, Iowa; and Sioux Falls, South Dakota. Both Local 304A of the United Food and Commercial Workers, and the United Food and Commercial Workers International Union (collectively the "Unions") represent the Sioux Falls employees. On July 1, 1986, the Arkansas City workers went on a lawful strike designed to secure a new collective bargaining agreement with Morrell. To increase the economic pressure on Morrell, Arkansas City employees traveled to the Sioux Falls plant and established picket lines there on August 4 and 15, 1986. On both occasions, the Sioux Falls workers honored these picket lines and refused to report to work.

Morrell then sought to enjoin the Sioux Falls employees from striking under section 301 of the Labor Management

[1] The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

Relations Act, 29 U.S.C. § 185 (1988). Morrell alleged that the Sioux Falls employees breached the no-strike provision of their collective bargaining agreement [2] by honoring the picket line established by the Arkansas City employees. The clause provides that:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike stoppage, slowdown, or suspension of work on the part of the Union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

(1985-88 Sioux Falls Collective Bargaining Agreement, Article II, cl. 5).

After an expedited evidentiary hearing, the district court granted Morrell preliminary injunctive relief. Upon expedited appeal to this court, we vacated the injunction [3]

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[2] Selected provisions of the Sioux Falls collective bargaining agreement are set out in an Addendum following this opinion.

[3] The district court found that the August 15 strike was not a sympathy strike but was actually a protest over Morrell's disciplinary actions toward workers who had honored the August 4 strike. Since the court found that this was a strike over an arbitrable grievance, it could be enjoined under the narrow exception to the statutory prohibition against enjoining strikes announced in *Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253, 90 S.Ct. 1583, 1594, 26 L.Ed.2d 199 (1970). Upon appeal, this court found "no evidence in the record" to support the district court's conclusion that the August 15 strike was not a sympathy strike. *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 804 F.2d 457, 461-62 (8th Cir.1986) (per curiam), *cert. denied*, 481 U.S. 1014, 107 S.Ct. 1889, 95 L.Ed.2d 496 (1987).

because the strikes were sympathy strikes,[4] as opposed to economic strikes, and thus could not be enjoined under the Norris-LaGuardia Act, 29 U.S.C. § 104 (1988). *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 804 F.2d 457 (8th Cir.1986) (per curiam), *cert. denied*, 481 U.S. 1014, 107 S.Ct. 1889, 95 L.Ed.2d 496 (1987). After remand to consider Morrell's claim for damages, and while discovery was in progress, employees of the Sioux City, Iowa plant also commenced a lawful strike in an effort to obtain a new collective bargaining agreement. The Sioux City workers picketed the Sioux Falls plant, as the Arkansas City workers had done, and the Sioux Falls workers again honored the picket line. This strike at the Sioux Falls plant lasted from May 1 to November 4, 1987. Morrell then filed an amended complaint seeking damages based on that most recent strike, and that case was consolidated with the other pending actions.

Upon the Unions' motion for summary judgment, the district court[5] ruled both that the refusal by the Sioux Falls workers to cross the picket line in 1987 was a sympathy strike in support of the Sioux City workers, as opposed to an economic strike, and that it was for a jury to decide whether the collective bargaining agreement barred such strikes. The case was then transferred to the Western Division of the District of South Dakota where the court reconsidered the Unions' motion for summary judgment and held that a jury should decide both: (1) whether the 1987 strike was a sympathy strike;

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[4] An economic strike is a "cessation of work by employees to enforce economic demands upon the employer in contrast to a strike caused by an unfair labor charge." *Black's Law Dictionary* 1276 (5th ed.1979). "A sympathy strike involves two unions; one is striking to force some concession from the employer; the other strikes in sympathy with the first's objectives. Sympathy strikes are a common manifestation of traditional union solidarity." *Id.*

[5] The Honorable John B. Jones, United States District Judge for the District of South Dakota.

and (2) whether the no-strike provision of the collective bargaining agreement prohibited sympathy strikes.

The case then proceeded to trial before a jury. The Unions moved for a directed verdict based upon their assertion that, as a matter of law, the collective bargaining agreement did not bar sympathy strikes. The motion was denied. The case was submitted to the jury on special interrogatories and, on March 10, 1988, the jury returned a verdict for Morrell on liability because it found that: (1) the 1987 strike was a sympathy strike; and (2) the Sioux Falls workers were prohibited from engaging in sympathy strikes by the no-strike provision in the agreement.

After the 1987 sympathy strike had concluded, but before this jury verdict, the Sioux Falls workers sought to return to work and replace the workers hired in their absence. Morrell refused to recall the strikers. The Unions filed grievances on behalf of these workers in which they argued that the collective bargaining agreement permitted sympathy strikes and that the agreement's seniority provisions required Morrell to rehire the sympathy strikers in place of less-senior replacements. Morrell denied the grievances, and the Unions sought arbitration of the issue.

After the liability phase of the jury trial had concluded, but during the damages phase of the trial, the arbitrator issued an award in favor of the Unions which sustained the grievances. Despite the earlier jury verdict that the no-strike clause prohibited sympathy strikes, the arbitrator independently examined the meaning of the no-strike clause and concluded that it did not waive the workers' right to engage in sympathy strikes. Based upon this ruling, the arbitrator held that the strikers were entitled to exercise their seniority rights and replace the workers hired during the sympathy strike.

The arbitration award was issued on November 5, 1988, and the damages phase of the jury trial concluded

on November 10, 1988. The jury awarded Morrell $24.6 million in damages based upon lost profits during the strike.

Morrell then filed a motion to vacate the arbitration award and the Unions filed a motion to enforce the award. The two actions were consolidated. The district court vacated the award because it held that the arbitrator had exceeded his authority by deciding the issue of the legality of sympathy strikes since Morrell had not consented to arbitrate that issue. Alternatively, the court held that the award should be set aside because the doctrine of res judicata bound the aribtrator to the jury's resolution of the issue during the liability phase of the trial. The Unions now appeal the court's judgment vacating the arbitration award. We will discuss their arguments and provide further factual details as raised in the context of these issues.

I.

The Unions contend that the district court should not have allowed the jury to determine the legal effect of the no-strike clause on the Sioux Falls workers' right to engage in a sympathy strike. They advance several arguments in support of this contention and we will consider each in turn. They also challenge the court's ruling that a Morrell internal memorandum offered into evidence by the Unions was protected by attorney-client privilege.

A.

We begin by determining the effect of our earlier decision, 804 F.2d 457, on the issues raised in this appeal. The Unions urge that this earlier opinion held that the Sioux Falls collective bargaining agreement did not bar their right to participate in sympathy strikes. They specifically rely upon the following language: "To the extent that the district court found that the first strike was a sympathy strike, that the parties' no-strike clause did not

prohibit sympathy strikes, and that the August 4 strike could not be enjoined by a federal court, we agree with the district court's analysis." *Id.* at 460. The Unions also point to language in the opinion stating that the Sioux Falls workers, by agreeing to return to work after the Arkansas City workers' picketing, did not waive the "right to engage in further lawful strike activity." *Id.* at 461 n. 5.

This panel is bound by Eighth Circuit precedent. *Waban-Inini v. Sexious*, 900 F.2d 1234, 1240-41 n. 4 (8th Cir.1990). We need not follow dicta, however, and we are satisfied that the language identified by the Unions in our earlier *Morrell* opinion was not essential to the judgment in that case. The only issue presented on the expedited appeal there was whether the Unions had engaged in a sympathy strike, which could not be enjoined under the Norris-LaGuardia Act, rather than an economic strike, which could be enjoined. The court was not called upon to decide whether the collective bargaining agreement barred sympathy strikes; rather, we merely had to determine whether a sympathy strike had occurred. Furthermore, our earlier decision expressly refrained from deciding the merits of Morrell's damages claim. 864 F.2d at 462 n. 7. We therefore conclude that our first *Morrell* opinion is not decisive on the issue of the impact of the no-strike clause on sympathy strikes.

B.

We must next determine what standard should guide our review of the district court's decision that the no-strike clause was ambiguous. The Unions argue that this determination is subject to de novo review, while Morrell vigorously maintains that we must defer to the court's analysis under the clearly erroneous standard.

We believe that deciding whether contractual language is ambiguous is a question of law which we review de novo; however, to the extent that we review factual find-

ings made by the district court, we apply the clearly erroneous standard. Judicial precedent supports our conclusion. *See Local Union No. 150-A, United Food & Commercial Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir.1985); *Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir.1984); *Motor Carriers Council v. Local No. 600, Affiliate of Int'l Bhd. of Teamsters*, 486 F.2d 650, 653 (8th Cir.1973). Moreover, the cases cited by Morrell are not inconsistent with our conclusion. *See Arkansas Rice Growers Coop. Ass'n v. Alchemy Indus.*, 797 F.2d 565, 567 (8th Cir. 1986) (stating that the construction of a contract is a question of law but review of disputed extrinsic evidence is governed by the clearly erroneous standard); *Landro v. Glendenning Motorways*, 625 F.2d 1344, 1352 (8th Cir.1980) (examining factual findings under the clearly erroneous standard after determining that the contract was ambiguous).

C.

We now apply these standards to the issues before us. The Unions assert that the district court should not have submitted the question of whether the no-strike clause barred sympathy strikes to the jury or admitted extrinsic evidence for interpretive purposes because the clause is unambiguous. They also assert that the evidence was insufficient to support a verdict in favor of Morrell. We believe it would be helpful at this point to set out some basic principles of contract law and labor law to aid in our resolution of these issues.

Extrinsic evidence may not be considered "for the purpose of showing that the parties intended to make an agreement which is inconsistent with the unambiguous words of their written contract." *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1300 (8th Cir.1980). Although extrinsic evidence may not be admitted to contradict the parties' intentions as expressed in the writing, it can be admitted to demonstrate that ambiguity exists. *Press Mach. Corp.*, 727 F.2d at 784-85; S. Williston, *A*

Treatise on the Law of Contracts § 600A, at 299-310 (3d ed. 1961). To determine whether there is an ambiguity, we must examine the relevant extrinsic evidence and decide whether the contractual language is reasonably susceptible of the meaning proposed by the party asserting the ambiguity. *The Realex Chemical Corp. v. S.C. Johnson & Son*, 849 F.2d 299, 302 (8th Cir.1988). If we decide that the language is ambiguous, then resolution of the ambiguity is a question of fact to be determined by the jury. *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local No. 433*, 826 F.2d 755, 764 (8th Cir.1987), *cert. denied*, 484 U.S. 1062, 108 S.Ct. 1019, 98 L.Ed.2d 984 (1988); *Press Mach. Corp.*, 727 F.2d at 784; Williston, *supra* § 616, at 652. The jury may properly consider extrinsic evidence in resolving the ambiguity.[6] *Press Mach Corp.*, 727 F.2d at 784.

We must apply these principles of contract law in the context of the labor law principles implicated here. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1988), generally grants employees the right to engage in sympathy strikes in support of a lawful strike by another union.[7] *Amcar Div., ACF Indus. v. NLRB*, 641 F.2d 561, 566 (8th Cir.1981). This right may be waived expressly or impliedly; however, an implied waiver must be established only by "clear and unmistakable" evidence. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983). "In

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[6] The Unions appear to argue that juries may use extrinsic evidence to interpret only unconditional, but not conditional, no-strike clauses. We see no basis in the law for such a distinction.

[7] It is not certain that this right extends to situations where the picket line is unrelated to the union that wants to honor it. *See* Brod, *Through the Window of Legislative History: A View on the Employees' Statutory Right to Honor a Stranger Picket Line*, 35 Kansas L.Rev. 9, 31 (1986) (suggesting that the Eighth Circuit, in *NLRB v. L.G. Everist, Inc.*, 334 F.2d 312 (8th Cir.1964), appears to have decided that honoring a stranger picket line is not protected by the National Labor Relations Act).

determining whether there has been a waiver of the right to engage in sympathy strikes, the collective bargaining agreement must be interpreted as a whole and in light of the law relating to it when made." *Amcar*, 641 F.2d at 566-67. *Amcar* also instructs us that:

> There are a number of relevant facts to examine in determining whether the Union intended to waive its right to engage in sympathy strikes. We look to the language of the contract, the structure of the contract, the bargaining history, and any other relevant conduct of the parties that shows their understanding of the contract.

Id. at 567. *See also Iowa Beef Processors v. Amalgamated Meat Cutters*, 597 F.2d 1138, 1144 (8th Cir.) (examined language, external circumstances, and policy considerations to determine whether the right had been waived), *cert. denied*, 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979).

Thus, we must next decide whether the no-strike clause is "ambiguous" in the sense that it is reasonably susceptible of the meaning proposed by Morrell, namely, that the Unions, in clear and unmistakable terms, waived their right to engage in sympathy strikes. Once we determine that the language is susceptible of this interpretation, then the issue is submitted to the jury [8] to resolve

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[8] The jury instruction, which the parties did not object to, correctly required Morrell to prove, by a preponderance of the evidence, that the Unions had clearly and unmistakably waived their right to engage in sympathy strikes. The instruction provided, in part, that:

> Even if you should decide that the strike was in fact a sympathy strike, the plaintiff Morrell may still be entitled to a verdict should you find by a preponderance of the evidence that the defendants, *clearly and unmistakably, waived, relinquished, or gave up the right* to engage in such sympathy strikes when they signed a collective bargaining agreement with Morrell November 20, 1985. . . .
>
> In determining this issue you are entitled to examine the contract language, the structure of the contract, the bargaining

the ambiguity and decide if waiver has occurred. The Unions rely upon *Barrett v. Safeway Stores*, 538 F.2d 1311, 1313 (8th Cir.1976) (per curiam), for the proposition that the contractual language here were unambiguous as a matter of law. We reject the comparison. "[F]or an unresolved ambiguity to constitute a genuine factual issue, we believe that the record as a whole must permit a rational trier of fact to find for the nonmoving party." *Realex*, 849 F.2d at 302. As stated previously, we may review extrinsic evidence in making this determination and, upon doing so, we are convinced that this standard was satisfied.

The Unions argue that an examination of extrinsic evidence still does not yield an ambiguity. They contend that the no-strike provision is expressly linked to the grievance-arbitration procedure and, therefore, it applies only to strikes over arbitrable disputes. The arbitrator, who considered the meaning of the no-strike clause as well as the recall issue, was persuaded by this "coterminous application" argument. He stated that:

> This clause clearly references and contemplates a direct connection with the arbitration provisions of the contract. It states that provisions have been made for "peaceful and orderly settlement of any disputes" which may arise between the Company and the Union. It then states "there shall be no strike . . . *on account of such disputes.*" . . . Thus, the contract itself expresses the doctrine of coterminous application. If this were not enough—and the Arbitrator thinks it is—the contract also conditions the promise not to strike on exhaustion of contractual efforts to settle the dispute. Since there are no available means under the contract for settling a primary dispute involving a separate bargaining

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history and other relevant evidence which the Court admits for your consideration on the issue of the intent of the parties. (Appellant's Appendix, Vol. I, at 124) (emphasis added).

> unit with an expired contract, *sympathy strikes are clearly allowed.*

(Award of Arbitrator, Nov. 5, 1988, at 16-17) (emphasis added).

We are not similarly convinced. The doctrine of coterminous interpretation arose in the context of collective bargaining agreements that contained an arbitration clause but lacked an express no-strike clause. In *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962), the parties' agreement did not have a no-strike provision, but the Supreme Court nevertheless held that the express arbitration clause created an implied duty not to strike over disputes subject to arbitration. *Id.* at 105, 82 S.Ct. at 577. The union in *Lucas Flour* was thus liable for damages flowing from breach of the implied duty to refrain from striking. The Supreme Court has also applied the doctrine of coterminous interpretation in the injunction context to hold that an agreement, containing an arbitration clause but not a no-strike clause, created an implied no-strike duty and, therefore, that a court could enjoin the strike. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 382, 94 S.Ct. 629, 639, 38 L.Ed.2d 583 (1974).

These decisions, however, do not compel the conclusion that the doctrine of coterminous interpretation applies to the situation before us. We are not faced with an agreement lacking a no-strike clause, as in *Lucas Flour*, nor do we have to determine the availability of injunctive relief, as in *Gateway Coal*. The issue confronting us is whether the parties' express no-strike provision has been breached so that the Unions are liable for damages. The Supreme Court has recognized that a strike which is not subject to injunction under the Norris-LaGuardia Act may nevertheless violate the parties' no-strike clause and subject the striking party to other remedies, such as damages. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 410-11, 96 S.Ct. 3141, 3148-49, 49 L.Ed.2d 1022

(1976). *See also Jacksonville Bulk Terminal v. International Longshoremen's Ass'n*, 457 U.S. 702, 721-22, 102 S.Ct. 2672, 2684-85, 73 L.Ed.2d 327 (1982) (stating that the issue of whether the strike was enjoinable is separate from the issue of whether the no-strike clause was violated.

In light of this precedent, we have previously distinguished between express and implied no-strike clauses, and held that the coterminous interpretation doctrine limited the effect of no-strike clauses to arbitrable disputes only in the latter case.[9] *Iowa Beef Processors*, 597 F.2d at 1145. If an agreement contains an express no-strike clause, then "the no-strike provision must be interpreted in light of the whole contract, rather than by looking only to the arbitration clause." *Id.* We stated that the issues raised by the arbitration and no-strike clauses remained analytically distinct, *id.*, and further stated that, [u]ltimately, each depends on the intent of the contracting parties." *Id.* (quoting *Gateway Coal Co. v.*

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[9] Other circuits have also reached this conclusion. The Sixth Circuit, in *Ryder Truck Lines v. Teamsters Freight Local Union No. 480*, 727 F.2d 594 (6th Cir.) (en banc), *cert. denied*, 469 U.S. 825, 105 S.Ct. 103, 83 L.Ed.2d 48 (1984), provides an excellent discussion of the doctrine of coterminous application and concludes that "no-strike clauses need not be construed narrowly to prohibit strikes only over arbitrable disputes." *Id.* at 601. The court declared that:

> Indeed, to hold that no-strike clauses must be construed as prohibiting only strikes over arbitrable issues would undermine the fundamental premise of freedom of contract on which federal labor policy is based by undercutting management's ability to obtain "an across-the-board no-strike clause and labor's ability to gain concessions in return for such a pledge."

Id. (quoting *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 445, 460 (3d Cir.1981)). In *United States Steel Corp. v. NLRB*, 711 F.2d 772 (7th Cir.1983), the Seventh Circuit held that the question of whether a no-strike clause barred sympathy strikes was to be answered by examining the contract and bargaining background, rather than by applying the principle of coterminous application. *Id.* at 776-78.

UMW, 414 U.S. 368, 382, 94 S.Ct. 629, 639, 38 L.Ed.2d 583 (1974)). We do not believe that the *Iowa Beef Processors* holding is limited to cases involving broad no-strike clauses. Such a litmus test would not yield a result founded upon the intent of the parties.

The cases cited by the Unions do not require a contrary conclusion. While *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed.2d 252 (1975), applied the doctrine of coterminous interpretation to an express no-strike clause, that case must be read in light of the Seventh Circuit's later decision in *United States Steel Corp. v. NLRB*, 711 F.2d. 772 (7th Cir. 1983), where the court refused to apply the doctrine when the extrinsic evidence indicated that the parties intended otherwise. *Id.* at 778-80. Similarly, in *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455 (3d Cir.1981), the Third Circuit refused to interpret a no-strike clause coterminously with the arbitration clause after examining the agreement as a whole, the statements of union officials, and the state of the law when the agreement was executed. *Id.* at 458-59. *See also NLRB v. Gould, Inc.*, 638 F.2d 159, 164 (10th Cir. 1980) (applying the coterminous interpretation doctrine to an express no-strike clause after finding that there was no extrinsic evidence to indicate that the parties intended to the contrary), *cert. denied*, 452 U.S. 930, 101 S.Ct. 3065, 69 L.Ed.2d 430 (1981).

We are satisfied that the doctrine of cotermious application does not govern our interpretation of the no-strike clause before us. Rather, we are to determine the scope of the clause by examining the language of the agreement and the external circumstances of the controversy. *Iowa Beef Processors*, 597 F.2d at 1144.

We now turn to the extrinsic evidence offered by Morrell in support of its interpretation of the no-strike clause. At a hearing before the district court, Morrell identified other provisions of the collective bargaining

agreement indicating that the parties wanted the no-strike provision to apply to sympathy strikes. Paragraph 3 of Article II of the agreement declares that the agreement shall "establish the means to facilitate peaceful adjustments of *all grievances or other disputes* that may arise between the Company and th Union." (Emphasis added). The Unions claim that this language is merely hortatory, but we are not convinced. It is well-established that, "[i]nterpreting a collective bargaining agreement, . . . we must construe the contract as a whole." *Amcar*, 641 F.2d at 569. *See also United States Steel Corp.*, 711 F.2d at 778 (examining the introductory provisions of the collective bargaining agreement to determine the parties' intent in a no-strike clause).

Morrell also argues that the "struck work" clause in paragraph 6 of Article II supports its interpretation. This provision allows Sioux Falls workers to refuse to perform work transferred from striking plants of other employers but expressly obligates the workers to accept work transferred from another Morrell plant which is on strike. That protection would be rendered meaningless if Sioux Falls employees could avoid their contractual duty to accept work from striking plants by simply engaging in a sympathy strike.

Furthermore, Morrell supported its position by presenting evidence of the parties' bargaining history. There was evidence that a union negotiator believed that the earlier no-strike clause, which was in effect from 1954 to 1056, barred all strikes. In 1956, Morrell proposed the no-strike clause which is currently in effect and before this court. It would be irrational to suggest that Morrell intended to limit the reach of the no-strike clause rather than maintaining the status quo.

In sum, we are satisfied that Morrell presented sufficient extrinsic evidence to establish that the no-strike clause was susceptible to the meaning that it proposed. Therefore, the district court properly allowed the jury to

decide the issue of whether the Unions waived their right to engage in sympathy strikes in clear and unmistakable terms.

Alternatively, the Unions argue that the jury's verdict was not supported by the evidence. In considering this challenge, we must bear in mind that "[e]vidence is to be considered in the light most favorable to the verdict," *Cerro Gordo Charity v. Firemen's Funded Am. Life Ins. Co.*, 819 F.2d 1471, 1485 (8th Cir.1987), and that we may overturn the jury's verdict only if "the evidence is suspectible to no reasonable inferences sustaining it," *id.* Under this demanding standard, our review of the evidence compels us to conclude that the jury verdict must stand.

Morrell provided evidence of the 1982 and 1985 contract negotiations.[10] During the 1982 negotiations, a Morrell negotiator stated that the company was considering proposing a change to the no-strike provision because of unauthorized strikes at other plants. A negotiator for the Unions responded that the current no-strike clause sufficiently protected the company. Morrell's negotiator then agreed that no changes were needed. While the Unions argue that this discussion referred to wildcat strikes and slowdowns, and not to sympathy strikes, it nevertheless evidences the parties' intent to resolve disputes through the grievance and arbitration process and to avoid strikes.

Evidence of the 1985 negotiations is even more powerful. There was testimony that the Unions repeatedly proposed changes in the collective bargaining agreement which would explicitly permit sympathy strikes. All such

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[10] The Unions complain that Morrell failed to present any evidence of the circumstances in 1956 leading to the inclusion of the current no-strike clause. We have recognized, however, on a previous occasion, that the reasons for lack of change may be more significant than the circumstances surrounding the original negotiations. *Amcar*, 641 F.2d at 567.

proposals were rejected by Morrell. Morrell adamantly refused such requests because the changes would essentially eviscerate Article II of the agreement.

The Unions concede that they sought to insert language permitting sympathy strikes and barring the transfer of work from plants on strike. They contend, however, that such changes were sought for all employees of packing houses represented by the International and local unions. They also argue that such proposals were not admissions but merely manifested a desire for explicit assurance of pre-existing rights. We note initially that this argument appears to indicate that the language was ambiguous. Regardless, we have previously declared that "an attempt by the Union to add such a [sympathy strike] provision is significant in inferring that the Union . . . waiv[ed] its right to engage in sympathy strikes." *Amcar*, 641 F.2d at 567 (citing *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 79-80, 73 S.Ct. 519, 524-25, 97 L.Ed. 832 (1953)), which considered the union's proposal to expressly permit refusals to cross a picket line as evidence of the parties' intent in their no-strike clause). These arguments were before the jury, and when we view this evidence in the light most favorable to the verdict, we conclude that the jury's verdict must be sustained.

D.

The Unions also challenge an evidentiary ruling that the district court made during the liability phase of the trial. The court held that an internal memorandum written by Morrell's general counsel, which came into the Union's possession because of another lawsuit, was protected by attorney-client privilege. We affirm the court's ruling on this issue.

Prior to the action before us, a group of Morrell employees at another plant brought a class action against Morrell and the United Food and Commercial Workers International Union, one of the unions involved in this

appeal, concerning a plant closing. *See Aguinaga v. Unitd Food & Commercial Workers Int'l Union*, 720 F.Supp. 862 (D.Kan.1989); *Aguinaga v. John Morrell & Co.*, 713 F.Supp. 308 (D.Kan.1988); *Aguinaga v. John Morrell & Co.*, 602 F.Supp. 1270 (D.Kan.1985). Morrell reached a settlement with the employee class but the International Union filed cross-claims against Morrell. Morrell and the employee class entered into a joint defense agreement whereby Morrell gave the employees access to seventeen privileged documents for use in their case against the International Union. Morrell waived its privilege as to four of these documents for use at trial. Five more of the documents, however, came into the International Union's possession when the employees' expert witness turned over files at his deposition. As a result, the International Union gained access to the internal memorandum in issue here, which is referred to as the Gass memorandum. The district court ruled that the document was shielded by attorney-client privilege and the doctrine of work-product immunity. It held that Morrell's waiver of privilege as to the initial four documents did not constitute a waiver as to the remaining documents. Therefore, the five documents which inadvertently came into the International Union's hands, including the Gass memorandum, were inadmissible in the *Aguinaga* case.

The Unions in this appeal sought to introduce the Gass memorandum into evidence in the district court below for the purpose of showing Morrell's belief that the no-strike clause did not prohibit sympathy strikes. The court below also held that attorney-client privilege barred admission of the evidence.

The *Aguinaga* employees and Morrell shared a joint defense privilege by virtue of being aligned on the same side following their settlement and the International Union's cross-claims. *See Medcom Holding Co. v. Baxter Travenol Laboratories*, 689 F.Supp. 841, 844 (N.D.Ill. 1988); *Western Fuels Ass'n v. Burlington N. R.R.*, 102

F.R.D. 201, 203 (D.Wyo.1984). "[W]hen information is exchanged between various co-defendants and their attorneys[,] . . . this exchange is not made for the purpose of allowing unlimited publication and use, but rather, the exchange is made for the limited purpose of assisting in their common cause." *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir.1977) (per curiam). It is fundamental that "the joint defense privilege cannot be waived without the consent of all parties to the defense." *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D.Ill.1980); *see also Western Fuels Ass'n*, 102 F.R.D. at 203.

Thus, neither the *Aguinaga* employees nor its counsel could waive the privilege on Morrell's behalf, and there is no evidence that Morrell itself waived the privilege. As the *Aguinaga* court held, Morrell's waiver as to four documents did not waive its privilege as to the rest. The fact that the Unions inadvertently gained access to the other documents does not affect this ruling.

The Unions argue that Morrell waived its privilege by allowing its general counsel to testify in the *Aguinaga* trial concerning one of the four documents which Morrell had agreed to release. While the Unions correctly recognize that a waiver of privilege as to one communication may extend to other communications relating to the same subject matter, *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982) (per curiam); *United States v. Cote*, 456 F.2d 142, 144-45 (8th Cir.1972), this argument is unavailing here. The released document neither involves sympathy strikes nor the no-strike clause. The documents were insufficiently linked for waiver as to one to constitute waiver as to the other.

II.

The Unions challenge several aspects of the damages phase of the trial. First, they contend that the district court should not have excluded either evidence offsetting

damages due to the lower wage rates of the replacement workers, or evidence of an Occupational Safety and Health Administration (OSHA) report discussing conditions at the Sioux Falls plant. Second, they argue that Morrell failed to prove that its damages were contemplated by the contract. Finally, they contend that the damages verdict was speculative. We will consider these claims of error separately.[11]

A.

Morrell claimed damages only for its profit lost during the strike. At trial, the Unions attempted to present evidence that Morrell's losses due to the strike were partially offset by the lower wages Morrell paid replacement workers after the strike. The district court excluded the evidence under Federal Rule of Evidence 403.

The Sioux Falls collective bargaining agreement allowed Morrell to pay lower wages to employees who had worked for Morrell for less than one and one-half years. Morrell paid the 2,200 replacement workers this lower rate, and the Unions contend that the damage award should be reduced to reflect the difference between the cost of paying the old workers and the cost of paying the replacement workers. This argument is directed solely at post-strike labor savings. At trial, the Unions were credited with all strike-related cost savings, including the lower wage rate paid during the strike, in determining Morrell's total damages during the strike period. (Tr. 1702-06).

We note initially the well-established principle that a "trial court's exclusion of evidence under Fed.R.Evid. 402

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[11] The Unions assert other prejudicial errors based on the following: (1) the court referred to the Unions' conduct as "illegal;" (2) Morrell was permitted to show that the Unions intended to injure the company; (3) the Unions were not permitted to explain that the contract breach was a sympathy strike; and (4) Morrell was allowed to present evidence about violence at another striking plant. We reject these claims, and they do not merit further discussion.

and 403 is entitled to substantial deference on review." *Hawkins v. Hennepin Tech. Center*, 900 F.2d 153, 155 (8th Cir.1990). We also recognize that, where the defendant's breach of contract has conferred some benefit upon the plaintiff, the doctrine of offsetting damages calls for the amount of the plaintiff's damages to be reduced by the amount of the benefit received. *Macon-Bibb County Water & Sewage Auth. v. Tuttle/White Constr.*, 530 F.Supp. 1048, 1055 (M.D.Ga.1981); *Louisiana Sulphur Carriers v. Gulf Resources & Chemical Corp.*, 53 F.R.D. 458, 461-62 (D.Del.1971); D. Dobbs, *Handbook on the Law of Remedies* § 3.6, at 181 (1973). We are satisfied, however, that the district court did not err in excluding evidence of labor savings for the time period following the strike. The Union, as the breaching party, have the burden of proving that "the breach resulted in a direct and immediate savings to the plaintiff," *Macon-Bibb*, 530 F.Supp. at 1055, and they have failed to meet this burden. Just as the plaintiff must prove his damages with reasonable certainty, Dobbs, *supra* § 3.3, at 148, the defendant must prove the amount of the offset with reasonable certainty, *id.* § 3.6, at 185.

The evidence offered by the Unions' expert on the offset issue focused solely on one cost component: labor costs. This self-serving analysis failed to examine the total economic effect of the breach upon Morrell. *See Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 353 (6th Cir.1958) (holding that the damage "formula was erroneous because it measured only increased costs rather than actual profit or loss"), *modified on other grounds*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960). Furthermore, the evidence offered to show the effect of replacement worker wage rates on labor costs was speculative. The Unions' expert assumed that all post-strike labor cost savings were solely attributable to hiring replacement workers. He did not consider the impact of factors such as changes in productivity, capital improvements, or product mix. The expert would not even com-

ment to a "ballpark" estimate of the effect of the offset on Morrell's damages. (Appellee's Appendix at 149-50, 178, 181-85).

In sum, we are satisfied that the Unions failed, as a matter of law, to meet their burden on this issue. Therefore, we hold that the district court did not err by excluding this evidence.

B.

At trial, the Unions offered into evidence a report by OSHA investigators concerning conditions at the Sioux Falls plant. The court excluded the evidence under Federal Rule of Evidence 403, and the Unions now challenge this ruling.

According to the Unions, the OSHA report provided evidence that the plant was violating OSHA requirements by assigning too few workers for difficult tasks, providing inadequate tools or equipment, and operating conveyor chains at excessive speeds. The Unions argue that this supports their theory that replacement workers were unable to achieve the desired performance levels because of plant conditions, and not as a result of the strike.

We review the district court's ruling with substantial deference, *Hawkins*, 900 F.2d at 155, and conclude that there was no error in excluding this evidence. The Unions argue that Morrell's damages resulting from operating in violation of law are not recoverable. *See Gibbs v. UMW*, 343 F.2d 609, 618 (6th Cir.1965), *rev'd on other grounds*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). We reject the OSHA report as evidence on this theory because it contained merely unproven allegations of violations. Furthermore, the Unions failed to establish the necessary causal link between lost profits and safety violations. Therefore, we conclude that the court correctly determined that this evidence was insufficiently probative to outweigh the potential for prejudice.

C.

The Unions argue that Morrell failed to prove that its damages claims were contemplated by the parties in their collective bargaining agreement. They correctly assert that Morrell's damages award may consist only of "the actual loss sustained . . . as a direct result of the breach and which may reasonably be supposed to have been in the contemplation of the parties as the probable result of such a breach at the time the agreement was made." *Eazor Express v. International Bhd. of Teamsters*, 520 F.2d 951, 966 (3d Cir.1975), *cert. denied*, 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342 (1976). We are satisfied, however, that Morrell's damages award meets this standard.[12]

The Unions contend that the parties had not contemplated damage claims for worker inexperience and inefficiency. In support of this, they identify a contractual provision requiring all workers to become objectively "qualified" for a job within two weeks. A union official testified that workers can become "qualified" for any job in the plant within two weeks. Based upon this, the Unions claim that Morrell should not be permitted to recover damages resulting from other subjective measures of replacement worker efficiency.

This argument is patently untenable. The contract provision to which the Unions refer concerns Morrell's ability to transfer employees between departments and does not support the proposition that a worker can efficiently perform any job in the plant, including skilled butchering, within two weeks. It was the jury's function, not this court's, to weigh the value and credibility of the union official's testimony on worker efficiency. Furthermore, we reject the Unions' assertion that the

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[12] Morrell claims that the Unions waived this foreseeability argument by failing to object at trial to Morrell's offers of proof on these damages claims. We need not decide this issue, however, because we reject the Unions' argument on other grounds.

contractual provision authorizing lower wages for new workers was intended by the parties to be a form of liquidated damages.

We also reject the Unions' argument that losses suffered by Morrell's distribution centers, which are warehouses selling Morrell products, were unrecoverable. It was within the contemplation of the parties that a strike slowing down production at the Sioux Falls plant would adversely affect distribution centers selling Sioux Falls products, and thus such losses were properly recoverable.

D.

Finally, the Unions argue that Morrell's damages verdict was the product of guesswork and speculation. They assert that Morrell's damages expert did not provide sufficient guidance to the jury because he testified as to alternative methods of assessing lost profits without providing a basis to distinguish among them. We also believe that this argument lacks merit.

Evidence of damages is sufficient as long as it is "not wholly speculative," *Pillsbury Co. v. Illinois Cent. Gulf R.R.*, 687 F.2d 241, 246 (8th Cir.1982), and permits the jury to "approximate damages on the basis of just and reasonable inferences." *Wagner Elec. Corp. v. Local 1104, Int'l Union of Elec. Workers*, 496 F.2d 954, 957 (8th Cir.1974). Moreover, we may not reverse the district court's admission of expert testimony absent "a clear and prejudicial abuse of discretion." *Delta Rice Mill v. General Foods Corp.*, 763 F.2d 1001, 1003 (8th Cir.1985) (quoting *SCNO Barge Lines v. Anderson Clayton & Co.*, 745 F.2d 1188, 1192 (8th Cir.1984)).

Lost profits are properly recoverable in actions in which unions are found to have violated their no-strike clause. *See, e.g., California Trucking Ass'n v. Brotherhood of Teamsters*, 679 F.2d 1275, 1289-90 (9th Cir. 1981), *cert. denied*, 459 U.S. 970, 103 S.Ct. 299, 74 L.Ed. 2d 281 (1982); *Iowa Beef Processors*, 597 F.2d at 1146.

This court will not review "the merits of various methods of calculation, so long as the method actually employed by the district court is designed to yield a reasonable approximation of damages." *Frito-Lay v. Local Union No. 137, Int'l Bhd. of Teamsters*, 623 F.2d 1354, 1364 (9th Cir.), *cert. denied*, 449 U.S. 1013, 101 S.Ct. 571, 66 L.Ed.2d 472 (1980).

Essentially, the expert's approach involved projecting the plant's sales and profits based upon historical data, determining the extent to which external factors had an impact on profits, adding strike-related losses such as decreased profits at the distribution centers, and deducting expenses which Morrell saved as a result of the strike. We believe that this method allowed the jury to "approximate damages on the basis of just and reasonable inferences." *Wagner Elec.*, 496 F.2d at 957. It was not error to permit the expert to discuss eight models of damage calculations with a range of estimates from $20 million to $31 million. The expert provided sufficient guidance by explaining the different assumptions upon which each model was premised.

We also note that the Unions extensively cross-examined Morrell's expert and offered their own expert testimony on the damages issues. We are compelled to conclude that Morrell's damages evidence was properly before the jury and provided it with the guidance necessary to determine damages. *See Iowa Beef Processors*, 597 F.2d at 1146.

III.

Finally, the Unions argue that the district court erred in vacating the arbitration award. As we have said, the parties sought arbitration on the issue of whether the strikers were entitled to replace the workers hired during the strike because they were protected by the seniority provisions of their collective bargaining agreement. The arbitrator issued an award after the liability phase of the bifurcated trial, but before the damages phase had

concluded. The award sustained the Union's grievances, ordered the reinstatement of the strikers, and held that the sympathy strikers did not violate the no-strike clause of the collective bargaining agreement.

Despite the earlier jury verdict expressly holding that the no-strike clause barred sympathy strikes, the arbitrator believed that he needed to independently interpret the clause because the reinstatement issue was fundamentally linked to the breach of contract issue. The arbitrator applied the doctrine of coterminous interpretation to hold that the no-strike clause barred only strikes over arbitrable matters, and therefore, did not prohibit sympathy strikes. Morrell then asked the district court to set aside the arbitration award, and the court granted the request. It held that the arbitrator had exceeded the scope of his authority and, alternatively, that the doctrine of res judicata bound the arbitrator. Since this issue is a question of law, we review de novo the district court's decision to vacate the award. *Nordin v. Nutri/System*, 897 F.2d 339, 344 (8th Cir. 1990). After carefully examining the record, we are satisfied that the district court did not err in this regard.

A.

"We begin by recognizing that where parties to a collective bargaining agreement have provided that an arbitrator's award shall be final and binding, the award is generally non-reviewable by a court." *Trailways Lines v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1420 (8th Cir.1986). "As long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 36, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987) (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960)). This defer-

ence means that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco*, 484 U.S. at 38, 108 S.Ct. at 371.

While our review of an arbitration award is narrowly circumscribed, this judicial deference "does not grant carte blanche approval to any decision an arbitrator might make." *Piggly Wiggly Operators' Whse. v. Piggly Wiggly Operators' Whse. Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 583 (5th Cir.1980). Rather, where "a court concludes that the arbitrator did not stay within the bounds of his authority, this principle of deference inevitably gives away . . . to the greater principle that an award not drawing its essence from the agreement is not entitled to judicial enforcement." *Centralab v. Local No. 816, Int'l Union of Elec. Workers*, 827 F.2d 1210, 1217 (8th Cir.1987). Such an award must be vacated because "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960); *see also Franklin Elec. Co. v. International Union, UAW*, 886 F.2d 188, 190-91 (8th Cir.1989). While the issue of whether the arbitrator exceeded his authority is reviewable, we must broadly construe the collective bargaining agreement and resolve all doubts in favor of the arbitrator's authority. *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 706 F.2d 228, 230-31 (8th Cir.1983) (en banc); *see also Pack Concrete v. Cunningham*, 866 F.2d 283, 285 (9th Cir.1989) (holding that "an arbitrator's interpretation of the scope of the issue submitted to him is entitled to the same deference accorded his interpretation of the collective bargaining agreement").

The district court thoroughly discussed this issue and then concluded that the arbitrator was not authorized to decide whether sympathy strikes were permitted by the collective bargaining agreement. This led the court to characterize the arbitrator's decision as "arbitration by ambush." It pointed out that it would have been irrational for Morrell to consent to arbitrate the meaning of the no-strike clause after obtaining a jury verdict in its favor on this issue; the court found this contention particularly incredible in light of the fact that neither party had submitted evidence to the arbitrator on the issue. The court also noted that the arbitrator's own characterization of the issue did not suggest that the issue of the legality of the strikes was submitted for arbitration. After reviewing the record, the arbitration clause, and the issue submitted for arbitration, we are similarly persuaded that the arbitrator failed to stay "within the areas marked out for his consideration." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960).

After the jury verdict on the liability issue, the parties held a preliminary arbitration hearing. There was evidence that the parties indicated at that time that they did not want the arbitrator to address the issue of the legality of sympathy strikes. Each party insisted that it would prevail in arbitration of the recall issue regardless of the outcome of the appeal of the liability verdict, the appeal currently before us. The parties discussed providing the arbitrator with their briefing of the sympathy strike issue; the evidence suggests, however, that the parties intended such information to be used only as background material for the recall issue. Indeed, when the parties stated the issues in their opening briefs for the arbitrator, neither party referred to the issue of the legality of the strikes. As a result, the arbitrator framed the issue before him in the terms agreed upon by the parties: "Do the seniority and discrimination pro-

visions of the parties' collective bargaining agreement apply to the recall of those employees who were on a sympatny strike from May 1 to November 4, 1987?"

This characterization of the issue contains no suggestion that the issue previously decided by the jury, the meaning of the no-strike clause, was submitted for arbitration. Moreover, neither party offered any evidence on the issue, although both parties had presented extensive evidence on bargaining history and relevant conduct to aid the jury in interpreting the no-strike clause. As the district court noted, this lack of evidence suggests that the parties believed that the issue would not be arbitrated.[13]

The Unions emphasize that Morrell relied upon a breach of contract defense in arbitrating the recall issue and point out that Morrell sought to frame the issue in the following terms: "Given a strike in violation of the agreement," was the company required to reinstate the strikers? We are not persuaded that this means that Morrell intended to arbitrate the meaning of the no-strike clause. Rather, it indicates that Morrell assumed that the strike was in breach of their agreement and thus provided a defense to the grievances. That assumption was supported by the jury verdict in the company's favor.

The Unions argue that the district court erred in holding that Morrell's consent was required in order for the arbitrator to reach the issue of the legality of the

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[13] This case is distinguishable from *Lackawana Leather*, 706 F.2d 228, where this court held that the arbitrator had not exceeded the scope of his authority in deciding an issue on which the parties had not presented evidence. *Id.* at 231-32. The fact that the parties had not offered evidence on the issue has more significance in this case than in *Lackawanna*. Here, the prior jury determination of the issue provides stronger support for the contention that the parties did not intend to arbitrate the issue and therefore saw no need to submit evidence on it.

strikes. They urge that since Morrell, in the collective bargaining agreement, agreed to submit "any dispute which may arise between the Company and the Union" to "final and bind arbitration," the arbitrator was authorized to resolve the issue of the legality of the strikes. The Unions seem to contend that the broad arbitration clause, which Morrell conceded made the legality of the strikes arbitrable, somehow prohibited Morrell from limiting the issues which the arbitrator may decide.

We reject the argument that the scope of the arbitrator's authority is limited only by the arbitration clause. It is fundamental that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co. v. UMW*, 414 U.S. at 374, 94 S.Ct. at 635. The arbitration provision "constitutes merely a promise to arbitrate." *Piggly Wiggly Operators' Whse.*, 611 F.2d at 583. "Before arbitration can actually proceed, it is necessary for the parties to supplement the agreement to arbitrate by defining the issue to be submitted to the arbitrator and by explicitly giving him authority to act." *Id.* "[O]nce the parties have gone beyond their promise to arbitrate and have actually submitted an issue to an arbiter, we must look *both to their contract and to the submission of the issue to the arbitrator* to determine his authority." *Id.* at 584 (emphasis added). "[T]he initial contract to arbitrate may be modified by the submission agreement or grievance." *Id.* There are many instances where courts have recognized that the scope of the arbitrator's authority depends, in part, upon how the parties have framed the issue to be arbitrated. *See, e.g., Synergy Gas Co. v. Sasso*, 853 F.2d 59, 63-64 (2d Cir.1988), *cert denied*, 488 U.S. 994, 109 S.Ct. 559, 102 L.Ed.2d 585 (1988); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1294 (9th Cir. 1987); *International Chemical Workers Union, Local No. 566 v. Mobay Chemical Corp.*, 755 F.2d 1107, 1110

(4th Cir.1985); *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 281 (1st Cir.1983); *Wren v. Sletten Constr. Co.*, 654 F.2d 529, 533 (9th Cir. 1981); *see also* R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 588 (1976). We believe that this case also illustrates such an instance.

We also note that "the agreement to arbitrate particular issues need not be express. It may be implied or established by the conduct of the parties." *Mobay*, 755 F.2d at 1110. The conduct of Morrell, described previously, which indicated that it did not intend to arbitrate the issue of the legality of the strikes, provides further support for our decision. In sum, we are satisfied that the arbitrator was not "even arguably . . . acting within the scope of his authority," *Misco*, 484 U.S. at 38, 108 S.Ct. at 371, in interpreting the no-strike clause, and therefore, the district court did not err in vacating the award.

B.

Alternatively, the district court held that the arbitration award must be vacated because, under the doctrine of res judicata,[14] the arbitrator was bound by the jury's finding that the collective bargaining agreement prohibited sympathy strikes. We recognize, as did the district court, that we need not reach this issue unless we assume that it was properly before the administrator, a

[14] Technically, the court's decision was based upon the doctrine of collateral estoppel, also referred to as issue preclusion. The Supreme Court has explained that:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, . . . the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979).

proposition which we have just rejected. We believe, however, that this alternative basis provides strong support for the district court's ruling and that it is appropriate that we consider it. The Unions challenge this reasoning by arguing that: (1) arbitrators are generally not bound by res judicata principles; and (2) even if res judicata principles were applicable, the requirements for the doctrine are not met here because the arbitration award was issued before the district court entered a final judgment in the case.[15] We reject these arguments and affirm the district court's vacation of the arbitration award on this ground also.

Assuming that the requirements of the test for issue preclusion are satisfied,[16] we believe that the arbitrator was barred from reconsidering the issue decided in the prior judicial proceeding. There is scant authority determining the effect of a prior judicial decision on an arbitration proceeding because the issue arises only in rare situations; several courts, however, have held that issue and claim preclusion may bar arbitrators. *See, e.g., Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 501 (5th Cir. 1986); *Telephone Workers Union of New Jersey, Local 827 v. New Jersey Bell Tel. Co.*, 584 F.2d 31, 33-34 (3d Cir.1978); *Burmah Oil Tankers v. Trisun Tankers*, 687 F.Supp. 897, 899 (S.D.N.Y.1988);

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[15] The Unions also argue that Morrell waived its res judicata defense by failing to assert it during arbitration. We are satisfied that Morrell sufficiently preserved this defense, particularly in light of the evidence indicating that the parties did not intend or expect the arbitrator to reconsider the meaning of the no-strike clause.

[16] Issue preclusion bars relitigation of an issue if the same issue was involved in both actions; the issue was actually litigated in the first action after a full and fair opportunity for litigation; the issue was actually decided in the first action on the merits; the disposition was sufficiently final; and resolution of the issue was necessary in the first action. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4416, at 137-38 (1981); *see also Parklane Hosiery*, 439 U.S. at 326 n. 5, 99 S.Ct. at 649 n. 5. It is only the finality requirement which is challenged in this appeal.

Hudson-Berlind Corp. v. Local 807, Affiliated with the Int'l Bhd. of Teamsters, 597 F.Supp. 1282, 1285-86 (E.D.N.Y.1984). Cases which have refused to apply issue preclusion to arbitrators have done so because the requirements for issue preclusion were not met. *See, e.g., W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 765, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983) (refusing to apply res judicata where arbitrator's earlier award had exceeded his authority); *McGraw Edison, Wagner Div. v. Local 1104, Int'l Union of Elec. Workers*, 767 F.2d 485, 489 (8th Cir.1985) (holding that an arbitrator was not bound by an earlier award involving a different contract and different union).

We recognize that the arbitrator had the authority to determine in the first instance whether to give the prior judicial determination preclusive effect. *Trailways Lines*, 807 F.2d at 1425. We must review the arbitrator's determination of the issue with deference, but we may vacate the award if his decision on the preclusion issue reflects his "own brand of industrial justice." *Misco*, 484 U.S. at 36, 108 S.Ct. at 371. In *Trailways*, for example, we held that an arbitrator was bound by a prior award involving "the same company, the same union, essentially the same issue, and interpretation of the same contract." 807 F.2d at 1425. *Trailways* involved the res judicata effect of a prior arbitration award upon a later arbitration. The situation before us presents a stronger case because we are examining the preclusive effect of a judicial proceeding in the same dispute. We cannot ignore the strong factual identity between the issue resolved by the jury and the issue addressed by the arbitrator. The liability trial and the arbitration proceeding both arose out of the same factual circumstances and involve the same parties and contract. If this entire series of disputes were addressed in one tribunal, there can be no doubt that the jury verdict would preclude further consideration of the legality of

the sympathy strikes. For the arbitrator to reject the jury verdict was to disregard the law, *see Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 750 (8th Cir.), *cert. denied*, 476 U.S. 1141, 106 S.Ct. 2249, 90 L.Ed.2d 695 (1986), and to substitute "his own brand of industrial justice," *Enterprise Wheel & Car Corp.*, 363 U.S. at 597, 80 S.Ct. at 1361, for the deliberations and verdict of the jury. Furthermore, the reasons given by the arbitrator for disregarding the verdict do not withstand scrutiny. He stated, in the arbitration award, that he was not bound by the jury verdict because he did not have the benefit of a trial transcript, the jury instructions, or the evidence justifying submitting the issue to the jury. Neither the lack of a trial record, nor his role as an arbitrator, authorized him to sit as an appellate court and consider anew the rulings of the district court and the verdict of the jury. Accordingly, we are unpersuaded by the Unions' arguments that the arbitrator was not bound by principles of res judicata.

Furthermore, we reject the Unions' argument that the verdict cannot have preclusive effect because the jury's liability verdict was not immediately appealable since the damages phase of the trial had not concluded. *See* 28 U.S.C. § 1291 (1988). While this circuit has not squarely confronted this issue,[17] we believe that finality

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[17] The Unions urge that this court resolved this issue in *United States v. Arkansas*, 791 F.2d 1573 (8th Cir. 1986), by stating that "[t]he doctrine of *res judicata* therefore is simply inapplicable, for there has been no earlier final judgment from which the State could appeal." *Id.* at 1576. The court there was addressing the narrow issue of whether a dismissal under Rule 54(b) of the Federal Rules of Civil Procedure should be given preclusive effect. The rule expressly provides that such dismissals are "subject to revision at any time before the entry of judgment" and therefore are inherently tentative. Thus, the court was not faced with the issue here: whether a jury verdict after a full trial on the merits precluded reconsideration of the issue. We are satisfied that the language which the Unions rely upon in *United States v. Arkansas* should

for purpose of appeal under section 1291 is not necessarily the finality that is required for issue preclusion purposes.

The availability of judicial review is merely one factor to consider in determining whether issue preclusion applies. *See* Restatement (Second) of Judgments § 13 comment g (1982). As Judge Friendly has explained, "'[f]inality' in the context [of issue preclusion] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986, 82 S.Ct. 601, 7 L.Ed.2d 524 (1962). "[W]e see no reason why in an appropriate case a ruling that is final on the issue of liability should not preclude the party against whom the decision ran from presenting further evidence on the issue there finally determined." *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 955 (2d Cir.) (Friendly, J.), *cert. denied*, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964). Other courts have also followed Judge Friendly's reasoning. In *Miller Brewing Co. v. Jos. Schlitz Co.*, 605 F.2d 990 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102, 100 S.Ct. 1067, 62 L.Ed.2d 787 (1980), the Seventh Circuit held that an interlocutory appeal from a preliminary injunction "will be given preclusive effect if it is necessarily based upon a determination that constitutes an insuperable obstacle to the plaintiff's success on the merits." *Id.* at 995; *see also O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir.1984) (per curiam); *Aiello v. City of Wilmington*, 470 F.Supp.

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not be read out of the context of the special factual circumstances of that case.

Furthermore, we are unpersuaded by the Unions' argument that *McGraw Edison*, 787 F.2d 485, stands for the broad proposition that arbitrators are not bound by res judicata principles. The court found the doctrine inapplicable there because the earlier award involved a different contract and different union. *Id.* at 489.

414, 418-19 (D.Del.1979), *aff'd*, 623 F.2d 845 (3d Cir. 1980); *Aetna Cas. & Surety Co. v. Jeppersen & Co.*, 440 F.Supp. 394, 399-403 (D.Nev.1977). Authoritative commentaries also provide support for our conclusion. *See* Restatement (Second) of Judgments § 13 comment g & illustration 3 (providing an illustration where a liability finding in a bifurcated trial would have a preclusive effect before the damages phase of the trial was completed); 18 C. Wright, A. Miller & E. Cooper, *supra* § 4434, at 321 (stating that "[r]ecent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings or to determinations of liability that have not yet been completed by an award of damages or other relief").

In sum, we are satisfied that the jury's verdict that the no-strike clause prohibited sympathy strikes was sufficiently final to bind the arbitrator here. Both parties presented abundant evidence on the issue at trial, and both had strong incentives to litigate the issue fully. Furthermore, the jury's verdict addressed the exact issue which the arbitrator chose to reconsider. Accordingly, we see "no really good reason for permitting it to be litigated again." *Lummus*, 297 F.2d at 89. Thus, the arbitrator's decision to ignore this precedent fails to draw its essence from the contract and was properly vacated.

IV.

In conclusion, we have carefully considered all of the Unions' arguments, and we are convinced that they lack merit. Accordingly, we affirm the district court's judgment in favor of Morrell and its order vacating the arbitration award.

McMILLAN, Circuit Judge, dissenting.

I respectfully dissent. In my view, the district court erred as a matter of law in finding that the no-strike

clause set forth in Article II, Clause 5 of the Collective Bargaining Agreement was ambiguous.

Ordinarily, construction of contractual agreements constitutes a question of law. *UFCW Local 150 v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir. 1985) (*UFCW Local 150*). The general rule is that interpretation of a contract is for the court and that the contract meaning is to be garnered from the four corners of the document. *Atkins v. Hartford Casualty Insurance Co.*, 801 F.2d 346, 348 (8th Cir.1986) (citing *Press Machinery Corp. v. Smith RPM Corp.*, 727 F.2d 781, 784 (8th Cir.1984). This rule reflects the sound policy judgment that assigning questions of contract interpretation to the court contributes to the stability and predictability of contractual relations by limiting the power of the trier of fact. *See Restatement (Second) of Contracts* § 212 comment b (1981).

To further this policy, questions of contract interpretation are also treated as questions of law for purposes of appellate review. *Restatement (Second) of Contracts* § 212 comment b. As this court has stated, appellate courts "are not required to defer to the interpretation given [to the parties' collective bargaining agreements] by the district court." *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *see Arkansas Rice Growers v. Alchemy Industries, Inc.*, 797 F.2d 565, 567 (8th Cir.1986) (it is well settled that the construction and legal effect of a contract are questions of law subject to de novo review); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 519 (8th Cir.) (the interpretation and construction of written contracts are matters of law within the competence of courts of appeals to review) cert. denied, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984); *United Auto Workers v. General Electric Co.*, 714 F.2d 830, 832 (8th Cir.1983) (intepretation of a contract is a matter of law and is not therefore subject to the clearly erroneous standard

of review by this court"; *Swenson v. Baker Industries, Inc.*, 615 F.2d 479, 483 (8th Cir.1980) ("the proper construction of a written contract is a question of law to be determined by the court").

The general rules just noted are subject to the one limitation that has been pressed in the present case, i.e., where a contract is deemed ambiguous, the court may weigh extrinsic evidence to aide in its construction. *UFCW Local 150*, 736 F.2d at 69. The ambiguity exception, however, is tightly bound. Extrinsic evidence is *not* admissible for the purpose of showing that the parties intended to make an agreement which is inconsistent with the unambiguous words of their written contract. *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1300 (8th Cir.1980). And a mere difference of opinion as to the proper interpretation does not render the contract ambiguous as a matter of law. *Press Machinery Corp.*, 727 F.2d at 784. Rather, a contract is ambiguous only if the court determines that its words are reasonably susceptible to more than one construction by a person acquainted with all operative usages and knowing all of the circumstances prior to and contemporaneous with the making of the contract. Finally, whether a contract is ambiguous is a question of law to be resolved by the trial court in the first instance and which is subject to review by the appellate court. *Motor Carriers Council, Inc. v. Local 600*, 486 F.2d 650, 652 (8th Cir.1973). The trial court's finding of ambiguity is not subject to the clearly erroneous standard of review, but rather is reviewed de novo by the appellate court. *Western Contracting Corp. v. Dow Chemical Co.*, 664 F.2d 1097, 1100 (8th Cir.1981). Stated in pure contract law terms, then, the threshold question in the present case is whether the district court correctly concluded that the no-strike clause in the parties' collective bargaining agreement is ambiguous and therefore subject to jury interpretation on the basis of extrinsic evidence.

However, to frame the issue solely in these terms ignores the labor law context in which this case arises and

the substantive labor law principles that are therefore implicated. Morrell brought this suit under § 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 (1988). The Supreme Court's decision in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1957) (*Lincoln Mills*), teaches us that in cases such as this the substantive law to apply is federal law, which the courts must fashion from the policy of our national labor laws. *Lincoln Mills*, moreover, provides concrete guidance as to how such law is to be fashioned:

> The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanctions but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.

353 U.S. at 457, 77 S.Ct. at 918.

The LMRA expressly furnishes some substantive law that is directly relevant to the issues presented in this case. Specifically, § 7 of that Act, 29 U.S.C. § 157 (1988), generally protects employees who engage in sympathy strikes in support of a lawful, primary strike by another union. *See AMCAR Division, ACF Industries, Inc. v. NLRB*, 641 F.2d 561, 566 (8th Cir.1981) (*AMCAR Division*). That protection, to be sure, is not absolute; under § 9 of the LMRA, 29 U.S.C. 159 (1988), an exclusive bargaining representative can, through collective bargaining, waive such a right on behalf of the employees represented by the union. *See id.* Nevertheless, the protection of the right to strike has real substance; the Supreme Court has made it clear that it is not proper to

> infer from a general contractual provision that the parties intended to waive a [LMRA] statutorily

> protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983). And, as this court once stated in a decision which correctly anticipated the holding in *Metropolitan Edison*,

> in the collective bargaining agreement, employees may waive their right to engage in sympathy strikes. Where there is not an express waiver of this right, the evidence of waiver must be clear and unmistakable.

AMCAR Division, 641 F.2d at 566 (citations omitted). Thus, general rules governing contract interpretation and specific statutory rules in the LMRA governing the right to strike tend to intersect.

In a commercial contract case, a showing by the plaintiff that a certain contractual provision may reasonably be read as prohibiting the defendant from acting as he did would be sufficient to establish that the contract is ambiguous. Under *Metropolitan Edison*, however, that there exists two plausible interpretations of a no-strike clause in a collective bargaining agreement, one permitting sympathy strikes and one prohibiting such strikes, does not establish a legally relevant ambiguity. As a matter of substantive labor law, a collective bargaining agreement which can be plausibly read to prohibit sympathy strikes and also plausibly read to permit such strike does not constitute a waiver of the statutory right to engage in sympathy strikes. Only an agreement which clearly and unmistakably waives that statutory right constitutes a legally operative waiver and only such an agreement can give rise to a breach of contract claim based on a sympathy strike. Thus, in our case, the threshold question for our review is whether the no-strike clause can reasonably be read to waive in clear and un-

mistakable terms the right to engage in sympathy strikes. And that question, like any threshold question of contract interpretation, is a determination for this court to make de novo.

In determining whether a contract is ambiguous, and, hence, whether the contract meaning is to be determined by the fact-finder on the basis of extrinsic evidence, the starting point is the language of the contract. The words chosen by the parties are to be given their plain and ordinary meaning as understood by reasonable persons experienced in negotiating the kind of contract in question. *Leman Bros. Kuhn Loeb Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1317 (8th Cir.1984) (citing *Universal Towing Co. v. United Barge Co.*, 579 F.2d 1098, 1101 (8th Cir.1978)), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985)).

First we note that express no-strike pledges fall into two general categories: (1) unconditional bans on any interference with production during the life of the contract; and (2) conditional bans which permit strikes under certain circumstances. *Basic Patterns: Strikes and Lockouts*, 2 Collective Bargaining Negotiations and Contracts (BNA) No. 1142, at 77:1 (1987). Over 60% of all no-strike clauses are of the unconditional type and ban any, all or every strike during the life of the contract without qualifications and without reference to the arbitration provision of the contract. *Id.* The clause being considered in this case is not of that type, however. Because the language is so critical to our analysis, it is worth repeating here. Article II, Clause 5 provides:

> Provisions having been made by this agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between company and the union or local union or any employee or employees, it is agreed that during the terms of this agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the

union or any local union or any union member or lockout on the part of the company on *account of such disputes until after the earnest efforts shall be made to settle all such matters in the manner provided in the respective amendments.*

By its own terms, this no-strike provision does not obligate workers to refrain from *all* work stoppages during the life of the contract; rather, it contains a promise not to strike on account of a specified class of disputes, disputes for which provisions have been made in the collective bargaining agreement "for . . . peaceful and orderly settlement." And even as to those particular kinds of disputes, the workers are free to strike after an earnest effort has been made to settle in the manner provided in the agreement. Thus, the no-strike provision is expressly linked to and limited by the obligation to settle disputes according to the grievance arbitration clause in the collective bargaining agreement. These words, if defined according to their plain and ordinary meaning as that meaning is understood by experienced, reasonable, labor bargaining-agreement negotiators, simply cannot be read to outlaw sympathy strikes because a sympathy strike, by definition, is not a strike over a dispute that is subject to peaceful and orderly settlement under the provisions of the bargaining agreement between the sympathy strikers and their employer. Rather, the dispute underlying the sympathy strike is always between the employer and a different group of workers and ordinarily arises out of those workers' efforts to secure a new collective bargaining agreement.

Indeed, it is precisely because a sympathy strike is undertaken in support of a sister union's effort to negotiate with its employer and because neither the causes nor the issues underlying a sympathy strike are subject to the settlement procedures provided by the contract between the employer and the union conducting the sympathy strike that the Supreme Court has held that sympathy strikes, unlike strikes over arbitrable disputes,

are not subject to federal court injunctions. *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 407-08, 96 S.Ct. 3141, 3147-48, 49 L.Ed.2d 1022 (1976); *see Purex Corp. v. Automotive Employees Union, Local 618*, 705 F.2d 274, 276-77 (8th Cir.1983). For precisely the same reason, the words of this limited no-strike clause expressly linked to the grievance arbitration procedure cannot be read to even plausibly, let alone clearly and unmistakably, proscribe sympathy strikes. A recent decision of the NLRB lends further support. In *Bristol Convalescent Home, Inc.*, the NLRB held that a no-strike clause which makes specific reference to arbitrability

> ([i]ndicates that the no-strike provision is functionally related to arbitration and intended to be in effect only when disputes could be resolved by the arbitration process. . . . This apparent relationship between the express no-strike provision and arbitration warrants the inference that the parties intended a narrower limitation on strikes than in cases involving the express no-strike provision that is functionally independent from the arbitration process.

Bristol Convalescent Home, Inc., 293 NLRB No. 73, slip op. at 3 (April 11, 1989).

Here, the no-strike clause does not contain a promise that there shall be no strike whatsoever; rather the clause states only that there shall be no strike on account of a dispute arising between the company and the union until after an earnest effort has been made to settle the disputes in the manner provided in the agreement. Clearly this promise applies only to strikes over arbitrable disputes between the company and the union. This clause cannot be fairly read to apply to situations in which there is no underlying dispute between the company and the union that is subject to being settled in the manner provided in the collective bargaining agreement. Only by distortion of the words in the contract is Morrell

able to even argue, let alone persuade a court, that the clause can plausibly be read to constitute a clear and unmistakable waiver of the right to engage in a sympathy strike.

Iowa Beef, relied upon by the majority, is distinct from the case at hand because it involved a general, unconditional no-strike clause, rather than a limited no-strike clause of the type contained in the instant contract. 597 F.2d at 1143-44. In *Iowa Beef*, the union argued that because of the clear and unmistakable waiver rule and because the union's promise not to strike was given in return for the employer's promise to arbitrate contractual disputes arising under the agreement, even the unconditional no-strike clause must be read to be confined *sub silentio* to arbitrable disputes. *Id.* at 1145. Although this theory has been rejected by some courts, including the *Iowa Beef* court, those courts have uniformly made it clear that where a no-strike clause is, in express terms, limited by the arbitration clause, it is presumed "that the employees' waiver [of the right to strike] is no greater than the employer's obligation under the arbitration clause." *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 458 (3d Cir.1981) (*Pacemaker*); *see United States Steel Corp. v. NLRB*, 711 F.2d 772, 777 (7th Cir.1983) (*United States Steel*). In *Pacemaker*, the express no-strike clause was in no way limited by its terms to arbitrate disputes. To the contrary, the agreement included one no-strike provision which was clearly intended to bar strikes over arbitrable disputes *and* another which covered strikes over all other disputes. *Pacemaker*, 663 F.2d at 456-59. Likewise, in *United States Steel*, the agreement contained a general, unconditional no-strike clause. 711 F.2d at 778. Rejecting an argument that the general no-strike clause should be limited to strikes over arbitrable disputes, the court nevertheless recognized, "[o]f course in cases where an arbitration clause and an express no-strike clause are closely interwoven, it may be reasonable to infer that the parties intended the two

provisions to have the same scope." *Id.* at 777. This is such a case. Not only is the no-strike clause in this case "closely interwoven" with the arbitration clause, it also expressly refers only to strikes over arbitrable disputes between the company and the union. As such it cannot reasonably be read as waiving in clear and unmistakable terms the right to engage in sympathy strikes, which are by definition, nonarbitrable disputes.

Finally, the court's reliance upon the "struck work" clause in the Sioux Falls collective bargaining agreement to negate the plain meaning of the no-strike clause at issue is misplaced. These two clauses deal with qualitatively different labor relation issues and do so in a way which create no conflict whatsoever. Under the LMRA, workers who elect to honor a lawful picket line and do not report to work and do not draw pay are exercising a statutorily protected right. *See* 29 U.S.C. § 157. Conversely, employees who elect to report to work and to draw their pay do not have any statutory right to refuse to perform struck work, namely, work undertaken for another employer whose workers are on strike. Thus, employers have the right to require their employees to perform such work. *See NLRB v. Electrical Workers*, 346 U.S. 464, 476 n. 12, 74 S.Ct. 172, 178 n. 12, 98 L.Ed. 195 (1953); *NLRB v. Montgomery Ward & Co., Inc.*, 157 F.2d 486, 496-97 (8th Cir.1946); *Vic Koenig Chevrolet*, 263 NLRB 646, 649-50 (1982).

For the reasons given herein, I would reverse the decision entered below and direct that judgment be entered for the unions on Morrell's claim for damages under the no-strike provision of the collective bargaining agreement. Because that provision does not, as a matter of law, bar sympathy strikes, I would also reverse the district court's decision vacating the arbitration award.

APPENDIX B

UNITED STATES DISTRICT COURT
D. SOUTH DAKOTA, W.D.

Civ. Nos. 88-5143, 89-5024

JOHN MORRELL & Co., a corporation,
Plaintiff,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,
Defendants.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC; AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 304A,
Plaintiffs,

v.

JOHN MORRELL & Co., a corporation,
Defendant.

March 15, 1989

MEMORANDUM OPINION AND ORDER VACATING ARBITRATOR'S AWARD

BATTEY, District Judge.

NATURE AND PROCEDURAL HISTORY

This matter comes before the Court on John Morrell & Co.'s (Morrell's) application to set aside the November 5, 1988, award of arbitrator William E. Rentfro. Local Union 304A of the United Food and Commercial Workers, AFL-CIO and the CLC and United Food and Com-

mercial Workers International Union, AFL-CIO and CLC (Union) apply for enforcement of the award. The arbitrator found that: "The 1987 sympathy strike was permitted by the clear, unambiguous and express provisions of this collective bargaining agreement." On March 10, 1988, more than seven months prior to the arbitrator's award, a jury empaneled in the Western Division of the District of South Dakota returned a verdict that the strikes at issue violated the collective bargaining agreement between the parties and were therefore illegal. The arbitrator, although possessing knowledge of the district court action, failed to follow the issues decided in the liability phase of the trial.[1] A separate jury empaneled in the Western Division of the District of South Dakota returned a damage verdict on November 10, 1988, in favor of Morrell in the amount of $24,600,000.

On November 8, 1988, Morrell filed an application and motion to set aside or stay the November 5, 1988, award of the arbitrator. The following day, on November 9,

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[1] The Court, to prevent confusion concerning the verdict, submitted the following two-part special interrogtaory to the jury:

SPECIAL INTERROGATORY #1

We find that the strike of May 1, 1987, was a (Select one alternative)

——— Sympthy strike

——— Primary or economic strike

SPECIAL INTERROGATORY #2

Is the defendant Local Union 304A prohibited by the terms of the collective bargaining agreement from engaging in sympathy strikes?

——— Yes

——— No

The jury found that the May 1987 strike was a sympathy strike (as did the Eighth Circuit in *John Morrell & Co. v. Local Union 304A*, 804 F.2d 457 (8th Cir. 1986)) and further answered Special Interrogtaory #2 in the affirmative finding that Union had bargained away (waived) its right to engage in sympathy strikes (an issue not previously before the Eighth Circuit).

1988, Union filed a complaint in United States District Court for the Northern District of Illinois, Eastern Division, seeking enforcement of the same award. The Illinois court, on February 10, 1989, transferred the Union's case to this Court pursuant to 28 U.S.C. § 1404(a). This Court then, pursuant to Fed.R.Civ.P. 42(a), consolidated the two cases by order dated March 6, 1989.

The Court has reviewed the extensive briefs in both cases. Having considered the arguments of the parties, the Court finds that the award of arbitrator William E. Rentfro of November 5, 1988, determining that "[t]he 1987 sympathy strike was permitted by the clear, unambiguous and express provisions of this collective bargaining agreement," must be vacated for the reasons set forth below.

DISCUSSION

The issue before the Court is whether the parties agreed to arbitrate the legality of the May 1 to November 4, 1987, sympathy strike. As the United States Supreme Court held in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960), "[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."

In *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), the Supreme Court applied the principles necessary to decide this issue as established in the *Steelworkers Trilogy: Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The Court concisely stated:

> The first principle gleaned from the *Trilogy* is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf, supra*, 363 U.S. [574] at 582, 80 S.Ct. [1347], at 1353 [4 L.Ed.2d 1409 (1960)]; *American Mfg. Co., supra*, 363 U.S. [564], at 570-571, 80 S.Ct. [1343], at 1364-1365 [4 L.Ed.2d 1403 (1960)] (BRENNAN, J. concurring). This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974).
>
> The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, *the question of whether the parties agree to arbitrate is to be decided by the court, not the arbitrator.*

(Citations omitted.) (Emphasis added.) The Supreme Court went on to note that: "The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced,' however, if a labor arbitrator had the 'power to determine his own jurisdiction. . . .' Cox, *Reflections Upon Labor Arbitration*, 72 Harv.L.Rev. 1482, 1509 (1959)."

The Eighth Circuit Court of Appeals in *Centralab, Inc. v. Local 816, Elec., et al. Workers*, 827 F.2d 1210 (8th Cir. 1987), applying the principles set forth in *AT & T* held that where an arbitrator decided issues not properly before him the district court correctly vacated the award. In vacating an arbitrator's award for exceeding the scope of his authority, a district court does not ignore the

strong precedent requiring courts to give great deference to the arbitrator's remedial powers. The Eighth Circuit found:

> Rather, whereas here, a court concludes that the arbitrator did not stay within the bounds of his authority, this principle of deference inevitably gives way, as recognized by the Supreme Court in *Enterprise Wheel*, to the greater principle that an award not drawing its essence from the agreement is not entitled to judicial enforcement.

Id. at 1217.

In his November 5, 1988, award, arbitrator Rentfro found it necessary to determine the legality of the sympathy strike from May 1 to November 4, 1987, as a threshold issue before addressing the seniority and discrimination provisions of the collective bargaining agreement. In so doing, the arbitrator considered the Eighth Circuit decision in *John Morrell & Co. v. Local Union 304A*, 804 F.2d 457 (8th Cir. 1986) (*Morrell I*) and the jury verdict rendered in the liability phase of *John Morrell & Co. v. Local Union 304A*, 641 F.Supp. 803 (D.S.D. 1986) (*Morrell II*). The result arrived at by the arbitrator was that the language of the collective bargaining agreement was so clear that any evidence of waiver by the Union of its right to sympathy strike "pushes the language of the contract past the breaking point." The arbitrator's decision was reached without the benefit of any parol evidence on the issue of waiver. The arbitrator stated, "Further, the arbitrator has not had the benefit of a transcript of the trial, the instructions of the trial court, or any record evidence which would give credence to that court's decision to submit this issue to a jury." Thus the arbitrator specifically failed to abide by the final judgment of the district court —a decision which remains final until reversed by appropriate appeal process.

This Court need not relitigate the merits of the arbitrator's award in deciding whether the parties agreed to submit the legality of the sympathy strikes to arbitration. *AT & T Technologies, Inc.*, 475 U.S. at 649, 106 S.Ct. at 1418. The Court, however, does find the lack of waiver evidence most telling in determining whether Morrell agreed to submit the legality of the sympathy strike for the arbitrator's consideration. It is difficult for the Court to fathom the notion that Morrell, after obtaining a successful jury verdict, would simply abandon that verdict, voluntarily resubmit the identical issue to arbitration, and then fail to introduce any evidence on the issue of waiver. This is particularly troubling in light of the fact that Morrell had daily copy of the trial transcript at its immediate disposal.

A review of the proceedings in district court prior to submission of the seniority and discrimination provisions of the collective bargaining agreement to arbitration is necessary to understand the strength of Morrell's position that it never agreed to place the legality of the sympathy strikes before the arbitrator. In *Amcar Division AFC Industries, Inc. v. NLRB*, 641 F.2d 561 (8th Cir. 1981), the Eighth Circuit found that employees may waive their right to engage in sympathy strikes. Considering a collective bargaining agrement with no express sympathy strike waiver, the court held:

> There are a number of relevant facts to examine in determining whether the Union intended to waive its right to engage in sympathy strikes. We look to the language of the contract, the structure of the contract, the bargaining history, and any other relevant conduct of the parties that shows their understanding of the contract.

Id. at 567 (citations omitted).

This evidence of bargaining history and relevant conduct was never before the arbitrator. The fact that

neither party submitted such evidence suggests that the arbitrator was not to decide the issue. The jury empaneled in the liability phase (*Morrell II*) on the other hand, received abundant evidence of the parties' understanding of the sympathy strike provisions in their collective bargaining agreement. After hearing the evidence, the Court instructed the jury in accordance with the law established by the Eighth Circuit in *Amcar*. Jury instruction #12 stated in part:

> However, the right to engage in a sympathy strike is a right which can be waived, that is, relinquished or given up by entering into a collective bargaining agreement which by its terms waives such right. Whether the defendant Local 304A waived the right to engage in sympathy strikes is for you to decide.
>
> In determining this issue you are entitled to examine the contract language, the structure of the contract, the bargaining history and other relevant evidence which the Court admits for your consideration on the issue of the intent of the parties.

The result was a verdict finding the sympathy strikes to be illegal under the collective bargaining agreement. Such finding became the law of the case.

The distinction between the issue presented in *Morrell I* and *Morrell II* is clear. In Morrell I the Eighth Circuit, reversing the district court's grant of a preliminary injunction, found that the Union had participated in 1986 sympathy strikes rather than economic strikes over arbitrable grievances. The court had no need to address the issue of waiver which was the issue in *Morrell II*. This Court distinguished the two issues in its order denying defendants' motion to reconsider where it held:

> In *Morrell I*, the issue was not whether the Union had waived its right to engage in sympathy strikes, but rather the issue was whether the Union had in fact engaged in a sympathy strike which was exempt

from injunction under the Norris-LaGuardia Act, 29 U.S.C. § 104. At no time did the district court or the Eighth Circuit Court of Appeals consider the factors set forth in *Amcar*, *supra*, at 567 and decide whether the Union waived its right to engage in sympathy strikes.

In *Morrell II*, the jury determined that Union had participated in sympathy strikes. The issue for the jury, then, was whether Union waived its right to sympathy strikes under *Amcar*. This Court utilized special interrogatories to properly prepare this case for the ultimate decision of the Eighth Circuit Court of Appeals. This methodology permits a reversal without the expense of a costly retrial.

To allow the arbitrator's award to stand, the Court must find that Morrell made a voluntary decision to abandon its waiver theory and to allow the arbitrator to decide the legality of the sympathy strike on the contract language alone. In light of the jury verdict deciding that the Union waived its right to sympathy strike, such a contention is absurd. Just as there comes a time when "the court should cease listening to testimony that white is black and that a dollar is fifty cents" (Corbin, *The Parol Evidence Rule*, Yale L.J., 603, 623 (1944)), a court must use its "judicial discretion" and "common sense" to view the realities of litigation, particularly in a case of such staggering importance.

A review of this file makes it clear that neither party in this series has left a stone unturned. The litigants have briefed and argued each and every detail. The suggestion that Morrell agreed to submit the legality of the sympathy strikes to arbitration after having secured a successful jury verdict flies in the face of common sense.

Most important in determining whether the parties agreed to submit the legality of the sympathy strike to arbitration is the arbitrator's own characterization of the

issue before him. The arbitrator's award states the issue as: "Do the seniority and discrimination provisions of the parties' collective bargaining agreement apply to the recall of those employees who were on sympathy strike from May 1 to November 4, 1987?" Even more enlightening is footnote 2 following the issue statement where the arbitrator noted Morrell's limited submission. Footnote 2 provides: "UFCW has attempted to subdivide this general issue into a series of subissues. Because the company only stipulated to the general issue, the arbitrator has retained the more general formulation. Nowhere in the arbitrator's issue statement does the arbitrator even hint at the possibility that the legality of the sympathy strike was submitted for arbitration.

The arbitrator, by deciding the legality of the sympathy strike, ignored his own characterization of the issue before him. The arbitrator's failure to request evidence on the issue of waiver served to reaffirm Morrell's belief that the legality of the sympthy strike was not subject to arbitration. Morrell's failure to submit the evidence already compiled in trial transcripts on the issue of waiver demonstrates that it did not agree to arbitration of the sympathy strike issue. To decide an issue of such magnitude without the consent of Morrell and without fully developing the record amounts to arbitration by ambush.

Because this Court has found that the legality of the sympathy strike was not properly before the arbitrator, it would not need to reach the res judicata effect of the jury verdict in *Morrell II* on the arbitrator's award. The Court, however, does so in order to provide a complete resolution of this case. Had the legality of the sympathy strike been submitted to the arbitrator, he would have been bound by the decision in *Morrell II* that the sympathy strike was unlawful. The jury verdict in *Morrell II* was the law of the case and should have been followed in the arbitrator's award determining the application of

seniority and discrimination provisions of the collective bargaining agreement.

In *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 750 (8th Cir.1986), the Eighth Circuit held that while an arbitrator's interpretation of the law is insulated from judicial review, an arbitrator's disregard for the law is not and may open the door for judicial scrutiny. The court held:

> Further, such disregard must "be made clearly to appear" . . . and may be found "when arbitrators understand and correctly state the law, but proceed to disregard the same. . . ."

Id. The arbitrator in this case clearly delineated the law to be applied, discussing both the Eighth Circuit's decision in *Morrell I* and the jury verdict in *Morrell II*. The arbitrator then proceeded to disregard the same and make an independent evaluation. The arbitrator ignored the Eighth Circuit's decision in *Morrell I* claiming that, "nor can the arbitrator be sure the Eighth Circuit will abide by its prior decision, dicta or not." [2] The arbitrator ignored the jury verdict in *Morrell II*, stating:

> It is true that the district court's decision is more directly on point, since it concerns this very strike. But the Eighth Circuit will almost surely have the last word. Further, the arbitrator does not have the benefit of a transcript of the trial, the instructions of the trial court, or any record evidence which would give credence to the court's decision to submit this issue to a jury. Thus, the arbitrator cannot be sure of the basis for that decision.

It is fundamental law that a jury verdict is the law of the case and is final and binding until reversed by an

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[2] This Court believes that *Morrell I* was properly decided under the theory of the case presented. It does not consider the reference to the contract provision and sympathy strikes dicta.

appellate court. *Stoll v. Gottlieb*, 305 U.S. 165, 170, 59 S.Ct. 134, 136, 83 L.Ed. 104 (1938). To ignore the law of the case simply because it has not yet been appealed is a manifest disregard of the law. Further, the law remains the law and the fact that the arbitrator was concerned that this Court may have erred in submitting the issue of waiver to the jury is irrelevant. The Eighth Circuit Court of Appeals and not the arbitrator will be the final authority as to whether this Court erred in its trial submissions of *Morrell II*. An arbitrator does not sit as an appellate court.

Whether the decisions of this Court made in both the liability and damages phases of *Morrell II* and its opinion in the present action are sound is a matter for the Eighth Circuit Court of Appeals. *Morrell II* is currently on appeal to the Eighth Circuit. To ease judicial administration, this Court has attempted to place this case in a posture for appeal so that all issues arising out of these sympathy strikes may be considered together.

It is therefore the determination of this Court that the arbitrator exceeded his authority by deciding the legality of the sympathy strike which was an issue not properly before him and further the doctrine of res judicata precludes his further inquiry into the issue of the question as to whether or not sympathy strikes were barred by the collective bargaining agreement.

In view of the fact that the arbitrator deemed the legality of the sympathy strike to be a prerequisite to the subsequent award, the award of November 5, 1988, will be vacated. Accordingly, it is hereby

ORDERED that the November 5, 1988, arbitration award of arbitrator William E. Rentfro is hereby vacated.

IT IS FURTHER ORDERED that judgment is to be entered in favor of John Morrell & Co.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 86-4126
86-4135

JOHN MORRELL & Co., a corporation,
Plaintiff,

vs.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,
Defendants.

ORDER

[Filed May 18, 1988]

On March 25, 1988, Defendants moved this Court pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for an order granting Defendants' judgment notwithstanding the verdict. On May 16, 1988, Plaintiff filed its responsive pleading.[1]

The record reflects that on March 1, 1988, this Court empaneled a jury to determine the issue of liability in this case. The jury reached a verdict for the Plaintiff on March 14, 1988, finding that the strike of May 1, 1987,

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[1] Extensions of time were allowed both parties in order that these post-trial motions be submitted in a timely fashion.

was a sympathy strike and that Defendant Local Union 304A was prohibited by the terms of a collective bargaining agreement from engaging in such sympathy strikes.

Defendants' motion for judgment notwithstanding the verdict is directed solely to the issue of whether the parties' labor agreement prohibits sympathy strikes. The record reflects that Defendants presented this Court with extensive argument on this issue in the posture of a motion for directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure both at the close of Plaintiff's case and again at the close of all the evidence presented at trial. No additional grounds are raised by Defendants' pending motion for judgment notwithstanding the verdict.

In the alternative, should this Court deny Defendants' motion for judgment notwithstanding the verdict, Defendants request that this Court certify the question presented for appeal pursuant to 28 U.S.C. § 1292(b).

The propriety of granting a motion for directed verdict or for judgment notwithstanding the verdict is determined by the same standard, both in the trial court and on appeal. *Svoboda v. Bowers Distillery, Inc.*, 745 F.2d 528, 530 (8th Cir. 1984). Such motions are to be granted only when the nonmoving party has presented insufficient evidence to support a jury verdict in his favor. *Id.*, citing *Hauser v. Equifax*, 602 F.2d 811, 814 (8th Cir. 1979). Accordingly, the evidence presented is viewed in a light most favorable to the nonmoving party without assessing credibility and the nonmoving party is entitled to the benefit of all inferences which may be drawn from the evidence without engaging in speculation. *Id.*

After having considered Defendants' motion for judgment notwithstanding the verdict, this Court finds that the Plaintiff did present sufficient evidence to sustain a verdict in its favor. Accordingly, the Defendants' mo-

tion for judgment notwithstanding the verdict will be denied. In addition, this Court denies Defendant's alternative request for certification pursuant to 28 U.S.C. § 1292(b) as this Court finds (1) that there is no substantial ground for difference of opinion respecting the issues raised and (2) that an immediate appeal would not materially advance the ultimate termination of this litigation.

Accordingly, it is hereby

ORDERED that Defendants' motion for judgment notwithstanding the verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure is denied.

IT IS FURTHER ORDERED that Defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) is denied.

IT IS FURTHER ORDERED that the trial of the damages portion of this case shall commence on Tuesday, November 1, 1988, at 9 a.m., as the Court's #2 case scheduled for that day.

Dated this 18th day of May, 1988.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
United States District Judge

ATTEST:

WILLIAM F. CLAYTON
Clerk

By /s/ Alice R. Raesly
Deputy Clerk

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 86-5364

JOHN MORRELL & COMPANY,
Appellee,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC,
Appellants.

DENNIS FOSTER, individually and in his capacity as president of defendant Local 304A; JAMES R. LYONS, individually and in his capacity as Business Representative and Corresponding Secretary of defendant Local 304A; JOHN DOE and OTHER PERSONS UNKNOWN.

Submitted Oct. 17, 1986

Decided Oct. 30, 1986

Before LAY, Chief Judge, and FAGG and BOWMAN, Circuit Judges.

PER CURIAM.

Local Union 304A of the United Food and Commercial Workers, AFL-CIO (Local 304A) appeals the district

court's [1] grant of John Morrell & Company's motion for a preliminary injunction. We reverse.

John Morrell & Co. (Morrell) is a meat processing business with facilities in Sioux Falls, South Dakota and Arkansas City, Kansas (Ark City). Local 304A, an affiliate of the United Food and Commercial Workers International Union, AFL-CIO and CLC, represents employees at the Sioux Falls plant and negotiates collective bargaining agreements with Morrell on behalf of those employees. Local 340, a different local of the same international, represents and negotiates with Morrell on behalf of employees at the Ark City facility. Neither local is a party to the other local's contract with Morrell.

When Local 340's contract with Morrell expired on July 1, 1986, its members struck at the Ark City plant to exert pressure on Morrell to negotiate a new collective bargaining agreement. On two separate occasions, August 4 and August 15, 1986, members of Local 340 also set up picket lines at the Sioux Falls facility. Local 340's business agent testified on cross-examination at the hearing on the preliminary injunction that Local 340's expectation was that if the Sioux Falls employees honored the picket lines, more pressure would be exerted on Morrell to negotiate favorably with the Ark City employees. On both dates, all but one to two percent of the Sioux Falls employees represented by Local 304A refused to cross Local 340's picket lines. While it appears that some officers of Local 304A spoke with Local 340 picketers, no evidence in the record indicates that any member of Local 304A carried picket signs or placards or engaged in any strike activity other than refusing to cross the picket line. The president of Local 304A testified before the district court that his intent as a member of Local 304A in refusing to cross Local 340's picket line was to show support for Local 340 in its contract negotiations with Morrell,

[1] The Honorable Fred J. Nichol, United States Senior District Judge for the District of South Dakota, presiding.

and that there was no underlying dispute between Local 304A and Morrell.

Anticipating that Local 304A might take action in support of the Ark City employees, Morrell informed Local 304A by letter on July 30, 1986, that it believed that the no-strike clause[2] in their collective bargaining agreement prohibited Local 304A from honoring a picket line set up in Sioux Falls by Local 340. In that letter, Morrell stated that any Sioux Falls employees who participated in such a strike were subject to termination. On August 4, 1986, the first date Local 304A members refused to cross Local 340's picket line, Morrell sought a temporary restraining order, preliminary injunction, and permanent injunction. That same day, before the issues could be addressed by the district court, Local 340 dismantled its picket line and Local 304A made an unconditional offer to return to work.[3] Although the Sioux Falls employees did return to work on the evening of August 4, Morrell took disciplinary action against the strike participants by noting each employee's absence on

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[2] The no-strike clause reads:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

Article II § 5, Agreement Between John Morrell & Co. and Local 304A and the International Union of the United Food and Commercial Workers, Nov. 20, 1985—Nov. 19, 1988.

[3] Local 304A's unconditional offer to return to work stated: "The picket line is coming down. We're making an unconditional offer to return to work on behalf of the membership of Local 304A, with the regular shifts, starting with tonight."

August 4 as "unexcused" in its files. In protest of Morrell's action, Local 304A filed a class grievance.

On August 15, when the members of Local 304A refused to cross a new picket line established by Local 340, Morrell applied for and obtained a temporary restraining order. After an evidentiary hearing on August 18, 1986, at which Local 304A moved the district court to vacate the TRO and deny Morrell further injunctive relief, the district court granted Morrell a preliminary injunction which prohibited Local 304A and all persons acting in concert with its members from participating in work stoppages at the Sioux Falls plant. The district court ordered that the issues raised in the court's memorandum opinion and order be submitted to arbitration. In its memorandum opinion, the district court found that the August 4 strike was a sympathy strike which could not properly be enjoined. However, relying on the fact that the second work stoppage occurred after the union had submitted an unconditional offer to return and had filed the class grievance, it concluded that the August 15 action was only in the guise of a sympathy strike and had been transformed into a dispute over underlying arbitrable issues. Because it had concluded that the second strike was over an arbitrable grievance covered by the terms of the parties' collective bargaining agreement, the district court determined that the second strike could be enjoined. After unsuccessfully seeking a stay from the district court pending appeal, Local 304A petitioned this court for an expedited hearing, which we granted.

To determine whether the district court properly enjoined Local 304A's strike activities, we start with the congressional limitation on a federal court's jurisdiction to issue orders enjoining a strike, set out in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104.[4] A narrow

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[4] Section 4 of the Norris-LaGuardia Act provides, in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction

exception to this statutory prohibition from enjoining strikes was established by the Supreme Court in *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), which allows an injunction to issue only if the strike is over a dispute which under the parties' collective bargaining agreement should be submitted to arbitration. In two subsequent cases, the Supreme Court emphasized the narrowness of the *Boys Markets* exception and held that a *Boys Markets* injunction may not issue unless the strike has been triggered by an arbitrable dispute. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 102 S.Ct. 2672, 73 L.Ed.2d 327 (1982), and *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976) (both cited in *Purex Corp. v. Automotive, etc. Employees Union*, 705 F.2d 274, 276 (8th Cir.1983)).

In gauging the intended scope of the *Boys Markets* exception to the anti-injunction rule, this court has observed that

> [t]he Supreme Court's opinions in *Buffalo Forge* and *Jacksonville Bulk Terminals* analyze the *Boys Markets* exception as a means for effectuating the national policy favoring agreements to arbitrate, and not as an enforcement mechanism for no-strike clauses. Both *Buffalo Forge* and *Jacksonville Bulk Terminals* distinguish between strikes where the underlying dispute is arbitrable and those where the legality of the strike itself is arbitrable. Only in the form category are strikes subject to injunction, because only there

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in any case involving or growing out of any labor dispute, to prohibit any person or persons participating or interested in such dispute * * * from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

does the strike represent a breach of the Union's agreement to arbitrate.

Purex Corp., 705 F.2d at 276; *see also Peabody Coal Co. v. International Union, UMWA*, 430 F.Supp. 205, 207 (E.D.Mo.1977). Moreover, even in *Boys Markets*, the Supreme Court cautioned that its views should not be construed to find "that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Boys Markets*, 398 U.S. at 253-54, 90 S.Ct. at 1593-94.

Applied to the facts of this case, the anti-injunction principles just outlined require that the district court find that Local 304A's strike activity represented a union response to a dispute over a grievance which the union was contractually bound to arbitrate. *See National Rejectors Indus. v. United Steelworkers*, 562 F.2d 1069, 1075 (8th Cir.1977), *cert. denied*, 435 U.S. 923, 98 S.Ct. 1486, 55 L.Ed.2d 517 (1978), (citing *Buffalo Forge*, 428 U.S. at 409, 96 S.Ct. at 3148). In the findings of fact contained in its order granting a preliminary injunction, the district court found that "[t]he [August 4, 1986] picket line was honored to show support for Local 340 workers" and that on August 15, 1986 "the workers again refused to cross a second picket line established at the Sioux Falls plant by Local 340." These findings, which are supported by the record, identify the underlying cause of strike activity on both dates to be Local 304A's response to the appearance of Local 340 pickets, motivated by a desire to show support for (the Ark City employees in Local 340's contract negotiations with Morrell. To the extent that the district court found that the first strike was a sympathy strike, that the parties' no-strike clause did not prohibit sympathy strikes, and that the August 4 strike could not be enjoined by a federal court, we agree with the district court's analysis. However, although the district court made no finding of fact that either strike at the Sioux Falls plant was motivated by a labor dis-

pute between Local 304A and Morrell, and did not find that members of Local 304A struck at any time other than the two separate dates that Local 340 pickets appeared in Sioux Falls, the district court concluded as a matter of law that local 304A's refusal on August 15 to cross Local 340's picket line was precipitated by the grievance filed by Local 304A to protest Morrell's discipline of employees who participated in the August 4 strike. The district court concluded that the second strike therefore fell within the *Boys Markets* exception and could be enjoined. For this conclusion, we can find no support in the record, in the district court's findings of fact, or in the applicable case law.

No evidence indicates that Local 304A was attempting to circumvent its contracted-for obligation to process this dispute through normal arbitration channels by striking. To the contrary, the record shows that Local 304A has sought, not avoided, arbitration of the grievance. Moreover, arbitration of the grievance will not resolve what the district court itself found to underlie Local 304A's strike actions—the desire to show support for Local 340. The evidence does indicate that a work stoppage occurred at the Sioux Falls plant on August 15 only when Local 340 pickets reappeared. The chronology of events on which the district court relied cannot alone support an inference that the August 15 strike was over Morrell's disciplinary acts, especially when the evidence at the hearing uniformly supports a conclusion that the August 15 strike, like the August 4 strike, was solely a sympathy strike in support of Local 340. Nothing in the record or in the district court's findings supports an inference of a cause and effect relationship between the grievance and the August 15 strike.

Further, the district court's reliance on *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6th Cir.1980), *aff'd on diff. grounds*, 451 U.S. 401, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981), to conclude that the August 15 work stoppage

was transformed into a strike over an arbitrable grievance is misplaced. In *Complete Auto*, the evidence in the record indicated that although the original non-arbitrable event causing the strike was resolved, the strike continued over an admittedly arbitrable dispute. *Id.* at 1111. The Sixth Circuit held that in determining the cause of a strike for purposes of issuing an injunction, a district court should consider what the strike was "over" at the time of its decision rather than what "precipitated" the strike in the first place. *Id.* at 1114.

Here, the event causing the August 4 sympathy strike, Local 340's stalled contract negotiations with Morrell, remained unresolved as of August 15. The fact that Local 304A filed a grievance indicates that Local 304A was consciously invoking arbitration machinery to resolve the dispute. The Sixth Circuit's reasoning in *Complete Auto* does not teach that whenever a grievance is pending which arose out of a strike that could not be enjoined, a union cannot subsequently engage in another protected strike. We know of no court which has relied on *Complete Auto*'s "transformation" analysis to find an injunction of a strike warranted. Nor does any case of which this court is aware, including *Complete Auto*, hold that because a grievance is pending a subsequent strike is presumptively undertaken in response to the dispute underlying that grievance. Moreover, the Sixth Circuit itself has apparently questioned the continuing vitality of *Complete Auto*'s transformation theory. Although *Complete Auto* was affirmed on other grounds on appeal, in a subsequent case discussing the prerequisites to issuance of an injunction pending arbitration, that court noted that "the Supreme Court has not addressed the validity of the transformation analysis." *International Union United Automobile, etc. Workers v. Lester Eng'g Co.*, 718 F.2d 818, 824 n. 1 (6th Cir.1983) (citing *Jacksonville Bulk Terminals*, 457 U.S. at 721 n. 22, 102 S.Ct. at 2685 n. 22). *Complete Auto* lends no support to the district court's conclusion

that the August 15 strike was not a sympathy strike to the same extent as was the strike on August 4.[5]

The uncontradicted evidence in the record indicates that although Local 304A's filed grievance resulted from Morrell's retaliation for Local 304A's participating in the August 4 strike, the grievance did not precipitate Local 304A's participation in the August 15 strike. Neither the record nor the district court's own findings support the district court's conclusion that the August 15 strike was not a sympathy strike but had been transformed by virtue of the filed grievance into a strike over an arbitrable matter. Because there is no evidence in the record to support the district court's finding that the August 15 strike was over an arbitrable grievance, the strike does

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[5] In concluding that the August 15 work stoppage was in the "guise" of a sympathy strike, the district court emphasized that Local 304A had made an unconditional offer to return to work which the district court "accepted." Citing no authority for its conclusions, the district court interpreted the "offer" as becoming part of the collective bargaining agreement, presumably concluding that in making the offer Local 304A waived its right to engage in any future strike of any kind. We believe that this interpretation of the events of August, 1986 overlooks the function of unconditional offers in labor relations as a means to conclude a strike and reinstate strikers to their original jobs without the union members being displaced by replacement workers. *See, e.g., NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81, 88 S.Ct. 543, 546-47, 19 L.Ed.2d 614 (1967); *C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 985 (5th Cir.), *cert. denied*, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970). *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir. 1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 109 (1970). The right of employees to engage in sympathy strikes in support of another union is protected under provisions of the National Labor Relations Act, *see* 29 U.S.C. §§ 157, 163, although employees may waive this right if the waiver is clear and unmistakable. *Amcar Division, ACF Indus. Inc. v. NLRB*, 641 F.2d 561, 566 (8th Cir. 1981). However, we do not believe that it is proper to construe this unconditional offer to return to work as a new promise, incorporated in the collective bargaining agreement, in which Local 304A waived its right to engage in further lawful strike activity.

not fall within the narrow *Boys Markets* exception to the anti-injunction rule. Under section 4 of the Norris-LaGuardia Act, the district court was without jurisdiction to issue a preliminary injunction.[6]

The decision of the district court is reversed,[7] and the district court is directed to vacate its order granting the preliminary injunction.

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[6] Although Morrell argues that our decision in *Campbell "66" Express, Inc. v. Rendel*, 597 F.2d 125 (8th Cir. 1979), is controlling here, we do not believe that case supports a different result. In *Campbell*, the district court found that the facts in the record demonstrated that the union had attempted to circumvent the result of a binding grievance proceeding by picketing the company. The district court made findings, supported by the record, that the purpose of the picketing was not primarily informational, as the union claimed, but was designed to get an employee rehired whose termination had been upheld by an arbitrator. Here, neither the record evidence nor the district court's findings support a conclusion that Local 304A's stated reasons for striking were pretextual.

[7] Morrell has also filed a complaint seeking money damages for harm allegedly incurred through Local 304A's activities. The merits of Morrell's request for damages has never been addressed, and we do not decide those issues here.

APPENDIX E

UNITED STATES DISTRICT COURT
D. SOUTH DAKOTA, S.D.

No. Civ. 86-4135

JOHN MORRELL & Co.,

Plaintiff,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC; DENNIS FOSTER, Individually and in his capacity as president of Defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of Defendant Local 304A; and JOHN DOE and OTHER PERSONS UNKNOWN,

Defendants.

Aug. 29, 1986

MEMORANDUM OPINION AND ORDER

NICHOL, Senior District Judge.

The plaintiff, John Morrell & Co. (Morrell), is a corporation engaged in the meat processing business, an industry affecting commerce within the meaning of the Labor-Management Relations Act section 301(a), 29 U.S.C. section 185(a), and the National Labor Relations Act (NLRA) section 2, as amended, 29 U.S.C. section 152. The defendants, Local 304A of the United Food

and Commercial Workers Union (UFCW), AFL-CIO (Local 304A), and UFCW International Union, AFL-CIO, (International), are unincorporated associations and labor organizations within the meaning of the NLRA Section 2(5), 29 U.S.C. section 152(5). Morrell and Local 304A and the International are parties to a collective bargaining agreement with a term from November 20, 1985 through November 19, 1988. The plaintiff brought this action pursuant to section 301 of the Labor-Management Relations Act, 29 U.S.C. section 185, seeking preliminary injunctive relief against further work stoppages by the defendants in violation of this collective bargaining agreement. For the reasons hereinafter stated, the plaintiff's motion for a preliminary injunction is granted conditioned upon the employer submitting both grievances to arbitration. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 254, 90 S.Ct. 1583, 1594, 26 L.Ed.2d 199 (1970).

FACTS

The collective bargaining agreement between Morrell and Local 304A and the International contains the following no-strike clause:

> 5. Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

Mandatory grievance and arbitration provisions are also contained in the agreement and are all specifically referred to in this no-stike clause ("the manner provided in the respective agreements").

Morrell's also has a meat processing facility located in Arkansas City, Kansas (Ark City). This facility's bargaining representative with Morrell is Local 340 of the UFCW, along with International. Any collective bargaining agreement between Morrell and the Ark City facility is separate and distinct from that between Morrell and Local 304A in Sioux Falls. The labor contract at the Ark City plant expired July 1, 1986, and when negotiations were unsuccessful between Local 340 and Morrell, Local 340 went out on strike. The legality of this strike is not at issue here.

On August 4, 1986, a number of the members of Local 340 set up a picket line in front of the Sioux Falls Morrell plant. With insignificant exception, Local 304A and the employees at the Sioux Falls plant whom Local 304A represent honored this picket line. At this time, Local 304A, as testified to by its president Dennis Foster, had no grievance with the plaintiff. The picket line was honored to show support for Local 340 workers.

Morrell immediately sought a temporary restraining order and injunctive relief to end this work stoppage. Before any court addressed this issue, however, Local 304A, by and through its business representative Jim Lyons, made an unconditional offer to return to work.

On August 8, 1986, Local 304A filed a grievance pursuant to the collective bargaining agreement, claiming a violation of Article II, Section 5, the no-strike provision, of the agreement. The union claimed that the contractual agreement permitted Local 304A members to honor picket lines without being subject to discipline or discharge. This grievance was filed in response to action taken by Morrell against employees who had refused to cross the picket line; the employees' personnel records were noted with an unexcused absence from work on that date.

Despite the unconditional offer to return to work and with the grievance pending, the workers again refused

to cross a second picket line established at the Sioux Falls plant by Local 340 on August 15, 1986. When this second work stoppage occurred, Morrell sought and obtained a Temporary Restraining Order (TRO), issued August 15, 1986, restraining the members of Local 304A from further work stoppages. Local 304A, by and through its president Dennis Foster, again, on August 15, 1986, made an unconditional offer to return to work.

ISSUE

The issue presented to the court was whether injunctive relief could be granted pending arbitration of the dispute between Morrell and Local 304A and the International under *Boys Markets, Inc. v. Retail Clerk's Local 770*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970).

In *Boys Markets*, the Supreme Court determined that an exception to the general anti-injunction rule of the Norris-LaGuardia Act, 29 U.S.C. section 104, is that an injunction could be granted where an employer sought to enforce the union's contractual obligation to arbitrate grievances rather than strike over them. *Boys Markets*, 398 U.S. at 249-253, 90 S.Ct. at 1591-1594. This narrow exception was further clarified in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976). In *Buffalo Forge*, the Court held that the *Boys Markets* exception does not apply when "*only* the question whether the strike violates the no-strike pledge, and not the dispute that precipitated the strike, is arbitrable under the parties collective bargaining agreement" *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702, 708-709, 102 S.Ct. 2672, 2678, 73 L.Ed.2d 327 (1982).

Buffalo Forge at first blush would appear to be dispositive of the issue before this Court. The factual situation addressed in *Buffalo Forge* was a pure sympathy strike, wherein members of one union with no dispute with their employer, honored the picket line of a separate

bargaining unit who in fact had a dispute with the same employer. *Buffalo Forge*, 398 U.S. at 399-404, 96 S.Ct. at 3143-3146. Since there was in fact no dispute between the union honoring the picket line and the employer, the sympathy strike was not *over* an arbitrable grievance and thus not subject to the *Boys Markets* exception. *Id.* at 404, 96 S.Ct. at 3146. The Court did not disagree that the issue of whether the sympathy strike violated the no-strike provision of the collective bargaining agreement was itself arbitrable. *Id.* at 405, 410, 96 S.Ct. at 3146, 3149. However, since there was *no underlying dispute* between the union and employer, no injunctive relief pending arbitration was justified, thus *Boys Markets* did not control the case. *Id.* at 407, 96 S.Ct. at 3147.

This reasoning of *Buffalo Forge* was reaffirmed in the subsequent case of *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702, 102 S.Ct. 2672, 73 L.Ed.2d 327 (1982). The dispute at issue in *Jacksonville* was whether the refusal by the union, in protest of the Soviet invasion of Afghanistan, to handle cargo bound to or coming from the Soviet Union violated the collective bargaining agreement between the parties. The employer sought injunctive relief pending arbitration of this dispute.

Both *Buffalo Forge* and *Jacksonville* addressed a work stoppage that occurred, not in response to any specific dispute between the union and the employer, but rather, was in response to some other distinct controversy, *i.e.*, another union's strike and the Soviet invasion of Afghanistan. This is similar to what occurred on August 4, 1986, in the case at bar. Local 304A, at that time, had no separate arbitrable dispute with the plaintiff. Local 304A simply honored the picket line established by Local 340 and thus squarely came within the *Buffalo Forge* rationale. Injunctive relief at that point would have been improper.

However, the union *unconditionally* agreed to return to work before the Court could even address the question of

injunctive relief. This *unconditional offer* was accepted by the company and became a part of the ongoing collective bargaining agreement. Local 304A, four days later, filed a grievance against Morrell charging that the employer's action in disciplining employees who failed to work on the day of the sympathy strike violated the no-strike provision of the collective bargaining agreement. The union, by filing this grievance, has recognized the arbitrability of this dispute between itself and the plaintiff. Yet one week later, on August 15, Local 304A again participated in a work stoppage under the guise of a "sympathy strike" for Local 340.

It is this subsequent work stoppage, after an unconditional offer to return to work following a grievance submitted by the Union, that distinguishes this case from both *Buffalo Forge* and *Jacksonville*. The original work stoppage, which began as a sympathy strike over a non-arbitrable dispute, has now been transformed into a dispute over an arbitrable issue, *i.e.*, the right under the collective bargaining agreement to discipline these workers. The Sixth Circuit has in fact addressed this "transformation" concept in *Compete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6th Cir.1980), *aff'd on other grounds*, 451 U.S. 401, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981). The Supreme Court, however, has not addressed the validity of this transformation analysis. *Jacksonville Bulk Terminals*, 457 U.S. at 723 n. 22, 102 S.Ct. at 2686 n. 22, citing *Compete Auto Transit*, 451 U.S. at 401 n. 4, 101 S.Ct. at 1839 n. 4.

In *Compete Auto* there was a work stoppage based upon an intra-union dispute. This stoppage was not enjoinable under *Buffalo Forge* because there was no underlying arbitrable dispute between the employer and union. After the intra-union dispute was settled, the work stoppage continued when a question arose over the amnesty the workers were to be given by the employer. This question of discipline was a dispute between the employer

and union and was over the terms of employment and thus arbitrable under the collective bargaining agreement. The Sixth Circuit noted that the focus in determining the propriety of injunctive relief should be on what the strike was *over* at the *time* of the *decision*, not what *precipitated* it in the first place. *Complete Auto*, 614 F.2d at 1110, 1114. This Court agrees.

The situation at bar, as supported by evidence, is such that the second work stoppage occurred after a grievance had been filed concerning the discipline of workers and after an unconditional offer to return to work has been accepted by the employer. Any subsequent stoppage, even if under the guise of sympathy strike, was transformed into a dispute over these underlying arbitrable issues and is enjoinable under the *Boys Markets* exception.[1] And further, resolution of the discipline grievance pending before the arbitrator will in fact resolve both the issue of the validity of a sympathy strike under the terms of the collective bargaining agreement as well as the discipline issue.

In addition to finding that an underlying dispute is arbitrable under the terms of the collective bargaining agreement, the court must also consider whether the ordinary principles of equity warrant the issuance of injunctive relief. *Boys Markets*, 398 U.S. at 254, 90 S.Ct. at 1594. In order to determine the equity of such relief, the court must consider: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict; (3) the probability of the movant's success on the merits; and (4) the public interest. *Data-*

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[1] This Court is not unmindful of the Eighth Circuit decision of *Valmac Industries, Inc. v. Food Handlers Local* 425, 519 F.2d 263 (8th Cir. 1975), *cert. granted, vacated and remanded*, 428 U.S. 906, 96 S.Ct. 3215, 49 L.Ed.2d 1213 (1976), but feels that the facts in the case at bar are distinguishable from *Valmac* and are much more in line with *Complete Auto*, and accordingly holds with the Sixth Circuit.

phase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 113 (8th Cir.1981) (en banc).

Testimony was presented to the court as to both the competitive nature of the meat processing industry and the fungible nature of the industry's product. When orders are unable to be filled customers in a competitive market are forced to go elsewhere. Often this can result in a permanent loss of this customer, especially when the inability to fill orders is repetitive and sporadic. Suppliers are also affected when the company is unable to accept delivery and keep its commitment as to the number of animals needed. All of these, customer loss, perishable nature of the product, and loss of suppliers, risks irreparable harm to the goodwill of the company. *See, Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir.1983).

The balance of harm in the case at bar falls on the side of Morrell. As noted above, the potential loss of goodwill, customers, suppliers, etc., is great. Local 304A and the International have not demonstrated what harm, if any, would result to the union if an injunction, conditioned on submission of the issues to arbitration, is granted. Such an injunction may, in effect, protect the job security of the defendant union members.

There is a broad no-strike provision contained in the current collective bargaining agreement between the parties. There was also evidence as to certain provisions that Local 304A and the International submitted during the negotiations of the present agreement. These proposed provisions specifically allowed the members of Local 304A to honor picket lines established at the Morrell facility without discipline or discharge. This provision was *not* incorporated into the collective bargaining agreement signed by both parties. Such evidence supports the probability of success on the merits for Morrell on both the issue of discipline and the legality of a sympathy strike.

Lastly, the Court in *Boys Markets* found in favor of allowing injunctive relief when the underlying dispute was present in order to further the congressional policy of favoring peaceful resolution of labor disputes. *Boys Markets*, 398 U.S. at 253, 90 S.Ct. at 1593. Undoubtedly peaceful resolution of the dispute in question is in the public interest.

Having found that, at the time of this decision, there is in fact an arbitrable dispute between Local 304A and Morrell which precipitated a second work stoppage on August 15, 1986, even though under the guise of another sympathy strike, and finding that the principles of equity favor the granting of injunctive relief,

THEREFORE, IT IS ORDERED:

That the plaintiff's motion for a preliminary injunction is granted, conditioned upon the employer (Morrell) submitting to arbitration. This Memorandum Opinion constitutes the Court's Findings of Fact and Conclusions of Law pursuant to F.R.C.P. 52(a).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5109SD

JOHN MORRELL & COMPANY,
Appellee,

vs.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC; DENNIS FOSTER, Individually and in his capacity as president of defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of defendant Local 304A; JOHN DOE and OTHER PERSONS UNKNOWN,
Appellants.

Order Denying Petition for Rehearing and Suggestion for Rehearing En banc

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No. 89-5152SD

JOHN MORRELL & COMPANY, a corporation,
Appellee,

vs.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO and CLC; UNITED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC,
Appellants.

Order Denying Petition for Rehearing and Suggestion for Rehearing En banc

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Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehearing the case en banc. Judge McMillian would have granted the petition.

Petition for rehearing by the panel is also denied.

December 6, 1990

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

ORDER ENTERED AT THE DIRECTION OF THE COURT

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89-5109

JOHN MORRELL & COMPANY,

Appellee,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC; DENNIS FOSTER, Individually and in his capacity as president of defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of defendant Local 304A; JOHN DOE and OTHER PERSONS UNKNOWN,

Appellants.

No. 89-5152

JOHN MORRELL & COMPANY, a corporation,

Appellee,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO and CLC; UNITED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC,

Appellants.

Appeals from the United States District Court
for the District of South Dakota

JUDGMENT

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 7, 1990

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

MANDATE ISSUED: 12/17/90

APPENDIX H

AWARD OF THE ARBITRATOR

November 5, 1988

Grievance No. 218-87

IN THE MATTER OF AN ARBITRATION

Between

JOHN MORRELL & COMPANY

And

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION and UFCW LOCAL 304A

This matter came on for hearing in Sioux Falls, South Dakota, on August 25, 1988, before Arbitrator William E. Rentfro, Professor of Law, University of Colorado School of Law, selected by the parties to hear and render a final decision on the issue in dispute.

The United Food & Commercial Workers and UFCW Local 304A, hereinafter "Union" or "UFCW," was represented by Richard Roesel, Assistant General Counsel, United Food & Commercial Workers International Union, Washington, D.C., and John Morrell & Company, hereinafter "Company" or "Morrell," was represented by Bradley R. Johnson and David J. Linesch of the law firm of Haynsworth, Baldwin, Miles, Johnson & Breckenridge, Tampa, Florida. After extended discussion by counsel it was mutually agreed by the parties to bifurcate the case. They stipulated to a preliminary issue; that issue was submitted on briefs and reply briefs, together with prof-

fered exhibits and summaries in the nature of each party's offer of proof. Briefing was completed on or about October 3, 1988.

BACKGROUND OF THE CASE

In 1986, the Morrell contract with a UFCW local at Arkansas City, Kansas, expired, and the workers at that plant went on strike. During that strike picket lines were twice set up at the Morrell plant at Sioux Falls, South Dakota. On both occasions the workers at Sioux Falls, represented by Local 304A, refused to cross the picket line. Morrell sought and obtained an injunction against the second of these sympathy strikes. This injunction was vacated by the Eighth Circuit Court of Appeals. *John Morrell & Co. v. Local Union No. 304A*, 804 F.2d 457 (8th Cir. 1986). In the course of its decision, that court commented, "[t]o the extent that the district court found that . . . the parties' no strike clause did not prohibit sympathy strikes . . . we agree." 804 F.2d at 460. In both cases, Morrell accepted the return of all the workers without taking any adverse actions against them.

In February, 1988, Morrell's contract with UFCW and its Local 1142, covering a plant at Sioux City, Iowa, expired. In March, Local 1142 went on strike. The parties disagree over whether this was an economic strike or an unfair labor practice strike, and NLRB proceedings on that issue are ongoing. From May 1, 1987, to November 4, 1987, Local 1142 maintained a picket line at Morrell's plant in Sioux Falls, South Dakota. Most of Sioux Falls' approximately 2,400 workers honored the picket line.

During the period of this sympathy strike, Morrell hired replacement workers. The replacements signed a form which states:

> I, the undersigned, acknowledge and agree that if my employment application is accepted by John Morrell & Co., Sioux Falls, I will become a regular full-time permanent replacement employee of the

> Company with an initial probationary period. My continued employment is subject to bargaining obligations with the union, or a final order by or settlement with the NLRB. My continued employment is also subject to satisfactory work performance and attendance and compliance with all Company rules and regulations, as well as normal business conditions relating to the availability of work.

Union Exhibit B [1]

According to the Union, Morrell actively hired replacements up to November 4, 1987, and was then advertising to hire further replacements. When the sympathy strike ended with an unconditional offer to return to work on November 4, however, Morrell abruptly stopped hiring. Despite the termination of 286 replacement employees between November 4 and December 31, 1987, Morrell did not take back any of the sympathy strikers until January, 1988. Indeed, Morrell advertised on November 3, 1987, that it would resume a lamb slaughtering operation and employ 70 new workers. After the offer of unconditional return to work, the operation was not resumed.

Since January, 1988, Morrell has effectively treated the strikers as entitled to recall based on seniority whenever vacancies arise. However, the Union contends (with proffered evidence) that the rate of recall has been extremely, and suspiciously, slow. Indeed, according to the Union's submission, the rate of recall is well below the rate of quits, retirements, resignations and discharges and the workforce has steadily shrunk.

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[1] The "probationary period" is apparently the thirty day period provided for in the collective bargaining agreement between the Company and Local 304A, which states: "new hired Employees will be required to serve a probationary period of thirty (30) . . . days, during which period such Employees shall be considered temporary and may be dismissed without reference to seniority, for unsatisfactory work or attendance." *Agreement*, Paragraph 40.2(d).

The Union also alleges that in May, 1988, Morrell shut down its night shift pork division. This affected 250 employees—most of them replacements or crossovers. While many of these employees were transferred to the day shift, 119 were given what amounted to new positions.

As of the date of the hearing in this matter, 408 sympathy strikers had been recalled. According to UFCW many of those recalled returned to jobs which they had not 22 previously performed, were not allowed to bid based on seniority for jobs they had previously performed, and some of these individuals were subsequently "disqualified" by Morrell for unsatisfactory performance.

Following the strike, Morrell filed a complaint for damages against the UFCW, alleging that the sympathy strike violated the no strike clause of the contract. The federal district court submitted this issue to a jury, which returned a verdict against the Union. A separate trial for damages was scheduled to begin November 1, 1988, and the liability verdict has not yet been reduced to a final, appealable, judgment.

ISSUE

As noted in the introduction, the parties agreed to bifurcate this arbitration and, at this stage, have jointly submitted the following issue to the Arbitrator:

Do the seniority and discrimination provisions of the parties' collective bargaining agreement apply to the recall of those employees who were on a sympathy strike from May 1 to November 4, 1987? [2]

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[2] UFCW has attempted to subdivide this general issue into a series of subissues. Because the Company only stipulated to the general issue, the Arbitrator has retained the more general formulation.

RELEVANT CONTRACT PROVISIONS

II

PURPOSE OF AGREEMENT

• • • •

5. Provisions having made by this Agreement and local agreements for the peaceful and orderly settlement of any dispute which may arise between the Company and the Union or local Unions . . . it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local Union . . . on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

• • • •

VI

POLICY

12. The Company agrees that, in accordance with applicable laws, it will not discriminate against any Employee or applicant because of . . . membership in the Union.

• • • •

Seniority

• • • •

40.2(a) Plant seniority: Plant seniority shall prevail for all plant purposes; including plant layoffs and recall; department selection at the weekly bump session; and job bidding from the plant master posting board. . . .

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POSITIONS OF THE PARTIES

1. *Union's Position*

The UFCW contends, first, that unjustified refusal to reinstate employees after a strike is "'discrimination

against employees by virtue of union affiliation.' " It contends that when the clause in this contract states that Morrell will not discriminate "in accordance with applicable law," it forbids any discrimination which would be improper under federal law. Generally, if a strike is properly characterized as an economic strike, the strikers are entitled to reinstatment as vacancies become available. They are not, however, entitled to displace permanent replacement hired during the strike. Thus, as replacement workers depart, strikers, not other replacements or hires, must be recalled. If, however, this was an unfair labor practice strike, the strikers would be entitled to displace even permanent replacements.

The Union argues that Morrell's conduct after November 4, 1987, plainly violated the strikers' rights. Its artificial ceasing to fill vacancies starting the very day the strike ended was "a blatant act of discrimination." Further, the replacement employees hired between October 4 and November 4 were still probationary and, by definition, temporary not permanent. In refusing to displace these plainly temporary replacements with permanent employee strikers, Morrell further discriminated in violation of the contract. Indeed, UFCW contends that the "acknowledgment" signed by replacements allowed them to be dismissed at the will of Morrell and made all the replacements temporary, not permanent.

The failure to resume the announced lamb slaughter operation, the ability to find over 100 new positions for replacement workers when Morrell had only offered jobs to a "handful" of strikers, and the extremely slow rate of recall all evidence Morrell's improper discriminatory purpose.

The Union contends further that the seniority provisions of this contract govern the right to recall from a strike. It cites *Tarcon, Inc.*, 64 LA 955 (Williams 1975), which concerned a mid-term strike which was permitted under the collective bargaining agreement. There,

the Arbitrator stated that "the parties have an existing labor Agreement applicable to the reinstatement of economic strikers." 64 LA at 957. Because the contract contained a broad seniority provision, Arbitrator Williams further held that economic strikers could displace permanent replacements, based on seniority. Here, the contract provides that plant seniority "shall prevail for all plant purposes." Plainly, this includes return from a strike which is, as in *Tarcon*, allowed under the contract. See also *Dynamic Manufacturers, Inc.*, 36 LA 635 (Crane 1960).

The Union, naturally, relies upon and agrees with the Eighth Circuit that sympathy strikes are permitted under this contract. It points out that both the NLRB ruling that this was an economic strike and district court decision that the strike was forbidden are subject to further appeal. Further, the NLRB's refusal to issue a complaint is not binding on the Arbitrator. *Dan's Market, Inc.*, 72 LA 706 (Harter 1979). The Union requests that the Arbitrator find that the contract applies, and schedule a hearing to determine if the contract's provisions have been violated.

2. *Company's Position*

The Company aptly states its position as follows:

> The Company's Position is that the articles cited by the Union do not apply to the recall from any strike, and especially the recall from a breach of contract strike. Instead, these provisions cited by the Union simply indicate how seniority shall apply for the purposes of the ordinary day-to-day functioning of the plant and evince a common agreement by an Employer not to discriminate against persons on the grounds of *inter alia* race, sex, color or union membership.

Morrell goes on to point out that an NLRB ruling, albeit under appeal, characterized the primary strike as

an economic strike. Furthermore, the federal district court has found that the sympathy strike was a breach of contract. And while the Eighth Circuit stated that sympathy strikes were allowed under this contract, that was mere dictum.

Morrell reasons that at most these strikers have the rights of economic strikers. Thus, they are only entitled to be recalled to vacancies and cannot displace "permanent" replacement workers. To read the contract to require more would undermine the statutory policy of allowing Morrell to hire 'permanent' replacements. Morrell cites several arbitration awards which have refused to find that contractual seniority or recall from layoff provisions granted strikers greater recall rights than established by statute.[3] Morrell also relies upon *Bio-Science Laboratories*, 209 NLRB No. 106, 85 LRRM 1568 (1974), for the proposition that "unreinstated economic strikers do not have the statutory right to recall in accordance with a collective bargaining agreement provision covering recall from layoffs."

Most importantly, in Morrell's view, when the strike itself is a breach of contract, the Union should not be allowed to claim that that very contract grants strikers a right to displace permanent replacements. See *Lancaster Iron Works*, 4 LA 760 (Brandschain 1946). See, also, cases cited in n. 3, *supra*.

With respect to the anti-discrimination provision, Morrell points out that its agreement is made "in accordance with applicable laws." From this, it reasons that the protection available under the NLRA is sufficient and "no further analysis nor adjudication need be undertaken" to enforce this provision. Secondly, Morrell contends that this provision cannot be applicable to a strike

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[3] E.g., *Anderson Tully Co.*, 88 LA 7 (Hart 1986); *Fairfield Aluminum Castings Co.*, 67 LA 613 (Smith 1976); *Federal Bearings Co., Inc.*, 48 LA 179 (Turkus 1966); *Walben Dir.*, 40 LA 267 (Loucks 1963); *Swift & Co.*, 8 LA 295 (Gregory 1947).

which itself was a breach of contract. Finally, Morrell contends that the Union's request for recall displacing permanent employees would itself discriminate on the basis of nonmembership in the Union.

DISCUSSION AND CONCLUSIONS

The fundamental issue presented to the Arbitrator at this stage is what rights, if any, this contract gives the sympathy strikers vis a vis the cross-overs and replacements. The Union grounds its arguments in the assumption that the strike was not a breach of the contract. Morrell relies, fundamentally, on its assertion that the strike was a breach of contract. Before reaching any other issue it is necessary to address this fundamental disagreement in the very premises of the parties' arguments.

1. *Was the Strike a Breach of Contract?*

a. *The Court Decisions*

In support of its position that the strike was lawful, the Union points to the Eighth Circuit's statement that "[t]o the extent that the district court found that . . . the parties' no strike clause did not prohibit sympathy strikes . . . we agree." *John Morrell & Co. v. Local Union No. 304A*, 804 F.2d 457, 460 (1986). The Arbitrator notes that the court also refused to find conduct by Local 304A had "waived its right to engage in *further lawful strike activity*." 804 F.2d at 461, n. 5. In reply, Morrell labels these comments "dicta"[4] and then points out that the district court has subsequently allowed a jury to reach the issue of whether the strike

[4] This characterization presumably results from the Eighth Circuit's limited holding that a preliminary injunction was improper. Since even an unlawful strike cannot always be enjoined, the statements regarding the legality of sympathy strikes is arguably unnecessary to the decision. *See, Buffalo Forge v. The Steelworkers*, 428 U.S. 297, 92 LRRM 3032 (1976).

voilated the contract, and the jury has returned a verdict for Morrell. Even as this decision is being written, a trial on damages is set.

The Arbitrator does not agree that the Eighth Circuit discussion of the legality of sympathy strikes under this contract language is dicta. That Court set out the exact contract language *verbatim* and not once, but twice, expressed the opinion that the language allowed sympathy strikes. The conclusion that sympathy strikes were allowed directly supports a decision that an injunction was not permitted—the very holding of that court. While that holding could be reached by other routes, this does not make the Eighth Circuit's statements superfluous. It is true that the disrict court's decision is more directly on point, since it concerns this very strike. But the Eighth Circuit will almost surely have the last word. Further, the Arbitrator does not have the benefit of a transcript of the trial, the instructions of the trial court, or any record evidence which would give credience to that court's decision to submit this issue to a jury. Thus, the Arbitrator cannot be sure of the basis for that decision. Nor can the Arbitrator be sure the Eighth Circuit will abide by its prior decision, dicta or not.

In the end, the Arbitrator feels he has the obligation to make an independent evaluation and finding on the issue of whether the contract allows sympathy strikes. The Arbitrator cannot predict what the final judgment of the courts will be; and the Arbitrator is compelled and authorized by the language of the contract itself to interpret and construe its obligations. See, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).[5] Clearly, the Eighth Circuit's opin-

[5] The Arbitrator, of course, is not bound by the same rules of *res judicata* and collateral estoppel as courts are. See, e.g., Elkouri & Elkouri, *How Arbitration Works* (4th Ed. 1985), p. 390, at nn. 80-81. This results in part from the limited grounds for setting aside an arbitration award; mere errors of fact or law have long

ion places significant weight in favor of finding that the sympathy strike was permitted under this contract.

b. *Waiver of the Right to Sympathy Strike*

On the merits, the Union contends that the no-strike clause clearly allows sympathy strikes. The clause is so clear, in the Union's view, that the parol evidence rule applies and excludes any consideration of secondary evidence. Morrell, without producing parol evidence, points to the jury's conclusion that, as a matter of fact, sympathy strikes were forbidden.

This Arbitrator is rarely impressed by an effort to rely upon the parol evidence rule. As a general matter, the true intent of the contract, if it can be found, is everything. If negotiating history and practice negate the apparently clear meaning of a provision, language must yield to evidence of actual agreement. On the other hand, the language of the contract is the first and best evidence of the parties' true intent; the further secondary evidence departs from apparently clear meaning, the harder it becomes to credit such evidence. Finally, the law renders certain provisions of collective bargaining contracts 'terms of art,' which have such a clear and generally accepted meaning that only one interpretation of the language in issue is plausible. No-strike clauses comprise one of those areas in which the law has created a complex framework for construing the contract. For the specific reasons that follow, the Arbitrator has concluded that past and current law on the waiver of smypathy strikes through no-strike clauses, and the language of this clause, compels the conclusion urged by the Union. A construc-

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been insufficient to set aside an arbitration award. However, were the Arbitrator confronted with uniform decisions, or a final decision not subject to appeal, that would weigh very heavily. In the face of inconsistency and probable further appeals, however, the contract calls for the Arbitrator's honest and independent judgment, not hairsplitting analysis of preclusive effect, or efforts at clairvoyance.

tion of this contract which finds a waiver of the right to engage in a mid-term sympathy strike pushes the language of the contract past the breaking point.[6]

c. *Coterminous Application*

The right to sympathy strike is, of course, protected by § 7 of the National Labor Relations Act. *Redwing Carriers, Inc.*, 137 NLRB 1545, 50 LRRM 1440 (1962), *enforced*, 325 F.2d 1011, 54 LRRM 1440 (D.C. Cir. 1963), *cert. den.* 377 &.S. 905. That right can be waived by a no strike clause, but only on "clear and unmistakable evidence." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 112 LRRM 3271 (1983); *Local Union 1395 v. NLRB*, 797 F.2d 1027 (C.D. Cir. 1986).

In determining whether a particular clause waives or does not waive the right to sympathy strike, the NLRB, the courts, and arbitrators have often resorted to the doctrine of "coterminous application." This doctrine began with the Supreme Court's decision that in the absence of an express no-strike provision, there was nonetheless an implied restriction on strikes over disputes subject to binding arbitration under the contract—the implied waiver of the right to strike was given a scope identical to the obligation to arbitrate. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 49 LRRM 2049 (1962). Later the Court found injunctive relief available where a strike violated a contract clause *and* the underlying dispute was subject to arbitration, stating, "[a]bsent an explicit expression [to the contrary] . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Gateway Coal Co. v. Mine Workers*, 414 U.S. 369, 382, 85 LRRM 2049, 2054 (1974).

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[6] As Professor Corbin put it: "At what point the court should cease listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense." Corbin, "The Parol Evidence Rule," *Yale L. J.*, 603, 623 (1944).

Since *Gateway Coal*, the NLRB and the courts have divided over whether a "broad" no strike clause does, or does not, waive the right to sympathy strike.[7] The NLRB initially, with the support of some courts, held that even an apparently blanket no strike clause was nonetheless subject to a presumption of coterminous application. *E.g.*, *Operating Engineers, Local 18 (Davis-McKee, Inc.)*, 238 NLRB 652, 99 LRRM 1307 (1978); *W-I Canteen Service*, 238 NLRB 609, 99 LRRM 1705 (1978), *enforcement denied*, 606 F.2d 738 (7th Cir. 1979); *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 107 LRRM 2667 (9th Cir. 1981). That is, such clauses would only forbid strikes which were subject to arbitration. By definition, this would not include sympathy strikes.

Other courts found the doctrine of coterminous application inapt when an express no strike clause on its face forbade "all" or "any" strikes and when the no-strike clause was "functionally independent" of the arbitration provision of the contract. E.g., *United States Steel Corp.*, 264 NLRB 76, 111 LRRM 1200 (1982), *enforcement denied*, 711 F.2d 772, 113 LRRM 3227 (7th Cir. 1983). This position has since been adopted by the NLRB. *Indianapolis Power & Light Co.*, 273 NLRB 1715, 118 LRRM 1201 (1985). For good measure, this last NLRB decision has been reversed, though on grounds which may allow a virtually identical decision to be reinstated. *Local Union 1395 v. NLRB*, *supra*.

The Arbitrator assumes, as appears likely *and* is most favorable to Morrell's position here, that under current law a no strike clause which on its face forbids "all" strikes, and has no connection with the arbitration provisions of the contract should be presumed to restrict sympathy strikes, despite the continuing validity of the doc-

[7] A "broad" no strike clause being one which on its face waives the right to "any," "all," or "every" sort of strike without qualification and without reference to the arbitration provisions of the contract.

trine of "coterminous application" in other contexts. And of course, in any case, waiver of the right to strike in sympathy must be "clear and unmistakable." *Local Union 1395 v. NLRB*, *supra*, 797 F.2d at 1036.

d. *The Clause in this Contract*

This clause clearly references and contemplates a direct connection with the arbitration provisions of the contract. It states that provisions have been made for "peaceful and orderly settlement of any disputes" which may arise between the Company and the Union. It then states "there shall be no strike . . . *on account of such disputes.*" (Emphasis added.) Thus, the contract itself expresses the doctrine of coterminous application. If this were not enough—and the Arbitrator thinks it is—the contract also conditions the promise not to strike on exhaustion of contractual efforts to settle the dispute. Since there are no available means under the contract for settling a primary dispute involving a separate bargaining unit with an expired contract, sympathy strikes are clearly allowed.

There are, no doubt, circumstances in which contract language creates a rebuttable presumption of coterminous application; just as there are circumstances in which it must be presumed that sympathy strikes are forbidden, but evidence can show otherwise. But here, the contract appears to directly embody the doctrine of coterminous application. Coterminous application is under these circumstances not just a helpful presumption or rule of construction, but the evident meaning of the contract itself. In light of the extensive history of that doctrine, the Arbitrator finds it beyond credulity that this clause could be understood by two parties as experienced in labor relations as UFCW and Morrell to be a "clear and unmistakable" waiver of the right to engage in a sympathy strike. The combination of the clear reference to a legal term of art, "coterminous application"; and the "clear and unmistakable" standard for evidence of waiver of

the right to sympathy strike, eliminates whatever room there could otherwise be for secondary evidence demonstrating a meaning contrary to the language of this contract. Not surprisingly, the Company has not even offered secondary evidence—other than the wholly unexplained jury verdict.

This contract does not waive the right to engage in sympathy strikes, i.e., respecting a proper sympathy picket line.

2. *Does the Contract Affect the Rights of the "Permanent Replacements"?*

a. *Were the Replacements Permanent?*

As a further threshold matter, the Union contends that the replacements were not 'permanent' in any event. There can be no doubt that Morrell reserved discretion to treat these 'permanent' employees as something other than permanent in any ordinary sense of that word. However, in *Belknap v. Hale*, 463 U.S. 491 (1983), the United States Supreme Court gave a similarly strained interpretation to the words 'permanent replacement,' leaving the Arbitrator in some doubt as to the proper conclusion in this matter. *Belknap* concerned actions for breach of contract and misrepresentation filed by 'permanent replacements' who had in fact been fired to make way for a strike settlement. In allowing these common law contract and tort actions to proceed without preemption by federal labor law, the Supreme Court held that an employer could protect itself from the competing claims of strikers seeking reinstatement and replacements claiming permanency by making the hiring of replacements 'permanent,' but 'conditional.' The court said:

> An employment contract with a replacement promising permanent employment, *subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of the strikers*, would not in itself render the replacement a

> temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike. . . . .
>
> . . . That the offer and promise of employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional. . . .

463 U.S. at 503 & 504 n. 8 (emphasis added). Here, of course, the hiring was made subject to any Board order and "bargaining obligations" with the Union. This language appears calculated to reflect the difference between most strikes which follow termination of the contract and a mid-term sympathy strike. In most strikes where "permanent" replacements are terminated on the abandonment of the strike, such action results from Board orders or from a strike settlement agreement. With a mid-term sympathy strike, there is not necessarily a settlement agreement, since the strikers are returning to work under a still-extant contract. This contract—its seniority provisions and its grievance and arbitration provisions—comprise the "bargaining obligations with the union" on which the replacement workers' continued employment is conditioned.

Thus, it is not clear that the first set of conditions Morrell put on the permanency of these replacements are the sort of conditions permitted, without destroying permanent status, by *Belknap*. The conditions here are meant to apply to a mid-term sympathy strike. These are not, however, the only conditions stated. In addition, replacements were "subject to satisfactory work performance and attendance and compliance with all Company rules and regulations . . . [and] availability of work." The Union has contended that these conditions render these employees subject to termination at will.

While it is not clear from the language of the "acknowledgment" alone, the Arbitrator notes that "proba-

tionary employees" under this collective bargaining contract are defined to be "temporary" and said to be subject to "dismiss[al] without reference to seniority, for unsatisfactory work or attendance." *Agreement*, paragraph 40.2(d). On the current evidence, the arbitrator cannot say whether dismissal "for unsatisfactory work or attendance" has been regarded, in practice, as allowing dismissal at will, or not. If it has, the Union's claim that none of the replacements were truly "permanent" would be very strong indeed. Such an exception does not "condition" the promise of permanent employment, it forecloses it. At present, however, the Arbitrator concludes that the Union should be allowed to present evidence that these employees were, in fact, temporary. A final ruling on that issue, if necessary, must await further evidence. For purposes of the balance of this decision, however, the Arbitrator will assume *arguendo* that at least those replacements who had served over thirty days as of November 4, 1987, were 'permanent.'[8]

b. *Assuming Permanent Replacements, Were the Sympathy Strikers Given Preference by the Seniority Clause of the Contract?*

Though Morrell rested its argument against applicability of the contract primarily on the alleged illegality of the strike, it has also argued that in no event does the contract alter the statutory allocation of rights between strikers and 'permanent' replacements. That statutory scheme has been alluded to above, but should be clearly summarized: Strikers remain employees while on strike, under § 2(3) of the NLRA; certain of the ordinary obli-

[8] Similarly, the Arbitrator makes no ruling on the status of the cross-overs. It is not clear, on this record, whether Morrell treated the cross-overs as 'permanent replacements.' Nor is it clear whether the UFCW wants the cross-overs treated as replacements, or on some other basis. Cf., *Independent Federation of Flight Attendants v. TWA*, 819 F.2d 839 (8th Cir. 1987). The rulings which follow may, or may not, moot these issues.

gations of employer and employee are, however, mutually 'suspended.'[9] An economic striker is entitled to reinstatement when a strike is over, unless the employee's position has been taken by a 'permanent replacement' before the striker has offered to return to work. *NLRB v. Mackay Radio and Tel.*, 304 U.S. 333, 2 LRRM 360 (1939); *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572-573, 105 LRRM 2138 (7th Cir. 1980). In that event, the striker can only return to work when a vacancy arises. See *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 666 LRRM 2737 (1967); *Laidlaw Corp.*, 171 NLRB 175, 68 LRRM 1253 (1968), *enforced*, 414 F.2d 99, 71 LRRM 3054 (1969), *cert. den.*, 397 U.S. 920. An unfair labor practice striker, on the other hand, is entitled to displace even a permanent replacement. *NLRB v. Mackay Radio and Tel., supra.*

In some respects, sympathy strikes fall between economic strikes and unfair labor practice strikes. As the District of Columbia Circuit has put it:

> Somewhere between these two polar examples [economic strikes and unfair labor practice strikes], we think, lies the question of . . . the right to honor picket lines. Essentially, sympathy strikes are a type of economic weapon available to employees; because union members expect that the refusal to cross picket lines will be reciprocal, the practice rests on employees' self-interest as well as "sympathy." . . . Still, we also recognize the right to honor picket lines is one that many union members cherish and, indeed, regard as fundamental to the union movement.

Local Union 1395 v. NLRB, supra, 797 F.2d at 1033. However, the statutory rule is that sympathy strikers

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[9] The recognition that strikes merely "suspended" certain aspects of the employment relationship, without ending it, entered American law well before passage of the NLRA. See, e.g., *Iron Molders Union No. 125 v. Allis-Chalmers*, 166 Fed. 45 (7th Cir. 1908).

'step into the shoes' of those on a primary strike, in terms of reinstatement rights. *Newberry Energy Corp.*, 227 NLRB 436, 94 LRRM 1307 (1970) (primary economic strike); *Gould, Inc.*, 237 NLRB 881, 99 LRRM 1705 (1978), *enforcement denied on other grounds*, 638 F.2d 159, 105 LRRM 2788 (10th Cir. 1980) (primary economic strike); *C. K. Smith & Co.*, 227 NLRB 1061, 95 LRRM 1617 (1977), *enforced*, 569 F.2d 162, 97 LRRM 2460 (1st Cir. 1977) (unfair labor practice strike).

The question, in essence, is whether the contract modifies (or to borrow from the Supreme Court, 'conditions') the permanency of the permanent replacements. Posed from the other direction, does the contract grant the sympathy strikers greater reinstatement rights than are granted by statute? For the reasons that follow, the Arbitrator finds that it does.

First, analytically, the existing collective bargaining agreement holds the same place, and serves the same function, as a strike settlement agreement. That is, when the strikers, who are employees, unconditionally offer to return to work, the contract is no longer in a state of at least partial 'suspension,' but resumes full force and effect.

Here, there is a plain right to sympathy strike expressed in the contract, which then states: "Plant seniority shall prevail for all plant purposes: including, "e.g., layoffs and transfers. Paragraph 40.2(a). As the Union notes, a list which begins with the word "including," is normally read to mean "including, but not limited to." When that list follows the assertion that seniority governs for "all plant purposes," it is even clearer that the role of "seniority" reaches beyond the listed items. The conclusion that plant seniority shall prevail for purposes of sympathy strikes, and recall therefrom, is logically compelling, and reasonably foreseeable.

There is no evidence that this matter was specifically discussed in prior negotiations. Moreover, while there is

"past practice" in the form of brief sympathy strikes from which all employees were recalled to their jobs by seniority, these instances are clearly distinguishable from the lengthy sympathy strike here. The Arbitrator's obligation, however, is not just to identify the matters which were admittedly discussed at the bargaining table. A collective bargaining agreement is often drafted in terms intended to structure the relationship of parties, even in circumstances the parties do not attempt to anticipate.

In essence, the Arbitrator agrees with the decisions cited by the Union which hold that when a contract contains a broad seniority clause, not limited to layoffs or other specific issues, and also contains a clear provision allowing some form of mid-term strike, the seniority clause controls return to work from the strike. E.g., *Tarcon, Inc., supra.*[10] Thus, effective November 4, 1987, the strikers here were entiled to take the place of any temporary replacement and any 'permanent' replacement and any cross-over, if the striker had seniority.

c. Does the Antidiscrimination Clause Apply?

Having concluded that the collective bargaining agreement was in full force and effect when the strike ended, the Arbitrator necessarily concludes that, for the same reasons, the Union can properly rely upon the antidiscrimination clause here. The parties apparently agree that this clause should be construed to be consistent with the requirements of federal law. The Arbitrator finds Morrell's suggestion that this clause can be ignored because the procedures of federal law exist, separately, to enforce the same standards is wholly unpersuasive.[11] The Arbitrator also finds that the Union has made a

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[10] See also *Atlantic Farms Market*, 70 LA 752 (Weiss 1978) and *Imperial Hardware Company*, 72 LA 169 (Ross 1979) (both holding that an express or clearly implied right to sympathy strike waives the right to hire permanent replacements).

[11] Compare *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

sufficient offer of proof to allow proceedings on the merits of its various claims of discrimination, to the extent those are not rendered moot by the decision on seniority. The parties will therefore be instructed to exchange all information relevant to such claims.

REMAINING ISSUES

There are several further points which the parties may choose to contest given this ruling. It is not clear, for example, whether the Union will want to claim that even full return of strikers to available positions on November 4 is sufficient because the existing positions did not reflect true business conditions. The other side of this coin allows Morrell to claim, if it chooses, that back pay for certain strikers is limited by objective business conditions which caused the post-strike workforce to be lower than the pre-strike workforce. Needless to say, individual issues of mitigation of damage and dates of return remain. The parties are instructed to attempt to agree on interim implementation of this award and to resolve as many remaining issues as possible by agreement. If full agreement is not reached, the parties are instructed to schedule dates for further hearings in this case; and, if possible, agree on the remaining issues, and exchange all information relevant to final hearing of those issues.

AWARD

The general issue to be determined initially—whether the seniority and discrimination provisions of the parties' collective bargaining agreement had application to the recall from the strike of May 1 to November 4, 1987—is resolved in favor of the Union.

The grievance is sustained to the following extent: The Arbitrator finds the 1987 sympathy strike was permitted by the clear, unambiguous and express provision of this collective bargaining agreement. Secondly, the Arbitrator finds that under the seniority clause in this

collective bargaining agreement, the senior sympathy strikers were, as of November 4, 1987, entitled to exercise their seniority to take the places of less senior temporary and "permanent" replacement workers. Thirdly, the Arbitrator finds that the antidiscrimination provisions of the collective bargaining agreement were applicable to determine the rights of returning sympathy strikers, and that the Union has presented an adequate offer of proof to allow further discovery and hearing on that issue, to the extent it is not moot. Finally, the Arbitrator has not ruled on which replacement workers, if any, were properly considered permanent, and will hear further proof on that issue if it is necessary or desirable for final resolution of this matter. The Arbitrator retains jurisdiction to decide any disputes that may arise between the parties concerning implementation of this Award.

WILLIAM E. RENTFRO
Arbitrator

IN THE MATTER OF
THE ARBITRATION BETWEEN

No. 218-87

JOHN MORRELL & COMPANY

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION and UFCW, LOCAL 304A

INTERIM INJUNCTIVE RELIEF

The Arbitrator having considered the Union's emergency motion for further relief, Morrell's opposition thereto, the Union's replay and Morrell's December 30th response thereto, and having determined that interim injunctive relief is necessary, pending final resolution of this matter, to ensure that the Arbitrator's interpretation of the contract is properly effectuated, the Arbitrator hereby directs that Morrell take the following action pending a final determination on the question of remedy for the violations found:

1. Morrell shall permit any employee whom Morrell refused to reinstate in his pre-strike job on or after November 4, 1987 to resume that job, if the job is currently being performed in the plant. Employees shall be permitted to claim such job effective the Monday of the first full week following issuance of this order.

2. Effective Monday of the second full week following issuance of this order, Morrell will permit any employees not reinstated in their former jobs because the job is not being performed to exercise bumping rights pursuant to the provisions of Paragraph 40.5 of the Local Agreement.

3. Morrell shall accept and process for payment all claims for covered medical expenses incurred by employees entitled to reinstatement on or after November 5, 1987, and, if health care providers inquire as to the existence of insurance coverage, shall notify them that coverage exists under the terms of the existing health insurance plan.

4. By January 30, 1989, Morrell shall present to Local 304A a list of those employees who had not returned to work as of November 4, 1987, showing for each employee the amount necessary to reimburse him for the difference between wages he would have earned between November 5, 1987 and January 30, 1989, had he been performing his former job or a substantially equivalent job during that period, and the wages he actually received from Morrell during that period.

Dated: 31st day of December, 1988

/s/ William E. Rentfro
WILLIAM E. RENTFRO
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Interim Injunctive Relief was mailed, via Federal Express, on December 31, 1988 to the following counsels of record:

Bradley R. Johnson, Esquire
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/s/ William E. Rentfro
WILLIAM E. RENTFRO

APPENDIX I

IN THE MATTER OF
THE ARBITRATION BETWEEN

No. 218-87

JOHN MORRELL & COMPANY

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION and UFCW, LOCAL 304A

ORDED GRANTING UFCW'S MOTION FOR FURTHER RELIEF

On November 5, 1988, this Arbitrator issued an award concerning a sympathy strike by Morrell employess and United Food and Commercial Workers Local 304A at the Sioux Falls, South Dakota, plant of John Morrell & Company. On December 16, 1988, counsel for UFCW submitted an "Emergency Motion for Further Relief" to the Arbitrator. On December 17 the Arbitrator issued an order to Morrell to show cause why UFCW's request should not be granted. On December 21, 1988, Morrell responded to the show cause order, objecting to the relief requested by UFCW. On December 29, 1988, the Arbitrator received a reply in support of its motion from UFCW, together with a suggested form of order. On December 30, 1988, Morrell responded to the Union's reply in support of its motion for supplemental relief. Being thus sufficiently advised of the parties' positions, the Arbitrator is prepared to rule on UFCW's motion.

Background to the Motion

The current dispute arises from an arbitration hearing conducted on August 25, 1988. At that hearing counsel

for UFCW and counsel for Morrell agreed the matter was properly before the Arbitrator for hearing, agreed the matter should be bifurcated and that the Arbitrator should issue a preliminary award on a stipulated issue. That issue, as stated by Morrell, was:

> Do the seniority and discrimination provisions of the parties' collective bargaining agreement apply to the recall of those employees who were on a sympathy strike from May 1 to November 4, 1987?

Central to a determination of this agreed issue was the further issue of whether the sympathy strike was or was not a breach of the collective bargaining agreement between the parties. That is, Morrell argued that the seniority and discrimination provisions of the contract did not apply because, in part, the strike was a breach of contract. UFCW argued that the seniority and discrimination provisions of the contract did apply because, in part, the right to sympathy strike was expressly recognized in the contract, and no breach of contract had occurred. Ultimately, the Arbitrator ruled in favor of the UFCW position, finding that the sympathy strike was not a breach of the contract which was in full force and effect at all relevant times. The Award continued, "the Arbitrator finds that under the seniority clause in this collective bargaining agreement, the senior sympathy strikers were, as of November 4, 1987, entitled to exercise their seniority to take the places of less senior temporary and 'permanent' replecement workers."[1] Finally, the Arbitrator retaianed "jurisdiction to decide any disputes that may arise between the parties concerning implementation of this Award."

Under the bifurcated procedure agreed to at the August hearing, the Arbitrator anticipated that the parties would be able to resolve certain issues relating to

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[1] The Arbitrator (and apparently both parties) regards this as a final order. In retrospect, perhaps clarity would have been served by adding the phrase, "and it is so ordered."

remedy and submit such issues as they could not resolve by agreement at a further Arbitration hearing. Instead, Morrell proceeded into federal district court in Sioux Falls and, on November 9, 1988, procured a stay of further arbitral proceedings.

After attempting without success to have this stay vacated, UFCW appealed the district court's action to the Eighth Circuit Court of Appeals. Morrell responded by requesting that the district court vacate the stay, which it proceeded to do. UFCW's appeal was then dismissed. The District Court for the District of South Dakota is now proceeding with briefing and argument of Morrell's request that the November 5 award be vacated. In the meantime, UFCW has initiated proceedings to enforce the award in the United States District Court for the Northern District of Illinois.

Following this litigative skirmish, UFCW filed its motion with the Arbitrator, contending a further order is needed to assure that the substance of the November 5 award can be reviewed in either (or both) of the pending federal court actions.

Positions of the Parties

1. *UFCW's Position*

In its motion, UFCW argued that because the November 5 award "is not final with respect to the remedy to be granted," it was "uncertain whether the award is capable of being enforced." To avoid this possible procedural barrier to judicial review of the award, UFCW argued that on evidence already before the Arbitrator the appropriate remedy could "be easily decided." UFCW argued that this evidence established that there were sufficient positions being held by less senior employees on November 4, 1987, so that all of the strikers could have been returned on that date. Thus, an order requiring

immediate reinstatement of all the strikers, with back pay and benefits, would be proper.

Following receipt of Morrell's response to this motion, UFCW has altered its position. Because Morrell disputes the facts underlying its initial request, UFCW now concedes that a further hearing allowing presentation and cross examination of the relevant evidence is necessary before truly final relief can be issued. However, UFWC now presses for an order granting interim injunctive relief requiring reinstatement of certain strikers and processing of health insurance claims for those strikers. Again, UFCW expresses concern that the November 5 Award may not be reviewable. In support of this concern, it cites *Millmen Local 550, etc., v. Wells Exterior Trim*, 828 F.2d 1373 (9th Cir. 1987). That case held that determinations of whether arbitration awards are ripe for judicial review should be made on analogy to the federal rule restricting the Court of Appeals to review of "final orders" of district courts. See 23 U.S.C., Section 1291. Under the final order rule, a ruling on liability alone, without specification of the remedy, is not "final" and therefore not reviewable. If *Millmen* is correct, judicial review of the November 5 award may be premature.[2]

Rather than pressing for immdeiate scheduling of a hearing to fully and finally resolve all remaining issues, UFCW asks that the Arbitrator issue an interim injunctive award. It cites yet another case which appears to hold that arbitral orders granting interim relief pending a final award are reviewable, at least to the extent of determining the propriety of the interim relief. *Local*

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[2] This presumes that there is no basis for a district court to review the November 5 award by analogy to either the collateral source doctrine or appellate use of the "All Writs Statute," 28 U.S.C., Section 1651. See, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) (discussing review of collateral orders) and *Will v. United States*, 389 U.S. 90 (1967) (discussing use of extraordinary writs).

1440 Hotel, Hospital, etc. Workers v. CNH Management Associates, 669 F.Supp. 632 (S.D.N.Y. 1987).

UFCW then argues that the requested interim relief is proper because the strikers are suffering injury which may not be fully remedied by a final award, and because the form of relief it suggests will not unduly burden Morrell.

2. *Morrell's Position*

Morrell initially notes that UFCW has filed an action to enforce the award, and in that action has taken the position that the award is " 'final and binding upon the parties.' " Morrell emphasizes that it "has never denied that the award was sufficiently final to permit judicial review or enforcement." Since the parties appear to agree that the November 5 award is final and can be reviewed, there is no need for further action by the Arbitrator.

Morrell also argues that there is no emergency in this matter, given the current scheduling of both the pending federal court actions. Morrell notes that the court in South Dakota is likely to act on its motion to vacate the award shortly. If the court does not vacate the award, prompt scheduling of proceedings leading to a final remedial award can take place. If the court does vacate the award, there is no basis for further action by the Arbitrator.

Finally, and as already noted, Morrell opposes the relief initially requested by UFCW because it disputes the underlying factual representations and would be denied due process if these facts were resolved without an evidentiary hearing.

Discussion and Conclusions

In the Arbitrator's view, UFCW's request, as revised in its reply, is effectively a request for a preliminary

injunction. There is no doubt that arbitrators are generally authorized to issue injunctive orders. See, e.g., Elkouri & Elkouri, *How Arbitration Works* (4th Ed. 1985), pp. 291-292. In deciding whether to issue a preliminary injunction here the Arbitrator has reviewed the request in terms of the considerations typically utilized by courts in granting such relief. These factors require the Arbitrator's best judgment of:

1. The probability that UFCW will ultimately succeed on the merits;

2. The irreparability and extent of the harm to UFCW and the strikers if interlocutory relief is not granted;

3. The balance of hardship, or how the harm to UFCW in the absence of an injunction compares to the unavoidable harm to Morrell if an injunction issues; and

4. The impact of granting or denying the preliminary injunction on important public interests.

See Fiss & Rendleman, *Injunctions* (Foundation Press, 2nd Ed. 1984), p. 343. UFCW's expressed concern that the November 5 Award may be unreviewable in the absence of a preliminary injunction will be considered to the extent it impacts on one or more of these factors.

1. *The Probability of Success.* Obviously, the Arbitrator has already ruled that UFCW will succeed at least to the extent that the seniority and antidiscrimination provisions of the contract apply to the return of the sympathy strikers following November 4, 1987. So long as the requested interim relief does not require action possibly beyond the scope of this ruling, this factor weighs heavily in UFCW's favor.

2. *Irreparable Injury.* There is no question that being unable to pursue one's normal employment can cause serious injuries. Typically, arbitral remedies are limited to restoring an employee to his or her position and providing compensation for loss of income. Unlike court ac-

tions for wrongful discharge, arbitrators do not generally provide employees with compensation for intangible, but often substantial, injuries such as emotional distress and other impairments to the quality of life. In the absence of such compensation, the injury of continued unemployment must be regarded as at least in part irreparable by any final order of this Arbitrator.

3. *The Balance of Hardship.* In the absence of the requested order, the potential for hardship to UFCW and the strikers is enormous. The longer a period of unemployment continues, the more likely it becomes that individuals will either abandon the possibility of ever being reemployed at Morrell, or will suffer genuinely catastrophic losses. Further, here the possibility that the November 5 order will at some stage be deemed unreviewable is significant.[3]

If, for example, the district court in South Dakota were to vacate that award, as Morrell suggests, appeal would surely follow. But even the agreement of Morrell, UFCW and the district court that the award was final would not foreclose the Eighth Circuit from determining, if it chose to, that the order was in fact not final and was unreviewable. Indeed, the Arbitrator suspects that issue would be considered jurisdictional and could be raised and decided *sua sponte* even if the parties tried their best to avoid it. If this happened, the matter would then be returned to the Arbitrator for entry of a final award, and the entire process of review, beginning

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[3] The Arbitrator notes that the rule allowing appellate review of a preliminary injunction is a statutory exception to the "final order" rule. See 29 U.S.C. Section 1292. The underlying theory of this exception, however, is that preliminary injunctions are effectively final as to the interim relief they order. Thus, the exception is consistent with the basic rule. The Arbitrator therefore assumes that the same reasoning by analogy which may make the November 5 order unreviewable, will make the requested preliminary injunction clearly reviewable.

with the district court and proceeding on appeal, would start all over again. The potential for delay from this sort of lurking procedural difficulty is serious and could cause grave hardship.

The Arbitrator recognizes that the requested relief could cause significant hardship to Morrell. If Morrell is ultimately found to be correct, forced reemployment of strikers who were not entitled to reemployment of strikers who were not entitled to reemployment would be a significant burden. However, the potential for delay in finally resolving this controversy could also work hardships on Morrell. The back pay obligations are a building liability, and if Morrell is ultimately required to comply with the November 5 award, interim reinstatement will actually save Morrell a significant amount of money.

Indeed, the Arbitrator considers it highly significant that both parties are actively seeking prompt judicial review of the November 5 award and both have some hope that the award is reviewable as it stands. In fact, it has been noted by the court in *Millman* (Footnote 3) that "an agreement to bifurcate might suggest that the parties and the arbitrator desired that each determination be final and binding." It should be noted that there are sound and compelling policy reasons, including the principle of efficient resolution of disputes and judicial economy, that support a finding that the November 5 award be considered a final award insofar as the underlying issue of contract interpretation submitted to the Arbitrator are concerned. In the alternative, by issuing the requested preliminary injunction, the Arbitrator will be assuring prompt review of the substance of that ruling and thereby putting both parties in the position they seem to want to be in.

Finally, it would be blinking reality to assume that the Arbitrator's award will be immediately effective. Morrell has already succeeded in securing a stay of that award

(and a later order vacating the stay), and is surely in a position to have that order stayed as well. To the extent there could be inappropriate hardship visited on Morrell, Morrell is well positioned to avoid that hardship.

4. *The Public Interest.* The same concern with delay has ramifications beyond the hardships of the parties. Arbitration is utilized in labor relations in part because of its potential for providing a relatively swift and sure resolution of issues in dispute. It is in the public interest, and specifically the interest of maintaining the integrity of the arbitral process to seek final resolution as soon as is practicable, and to avoid unnecessary delay.

The Arbitrator is aware that it is unusual to justify issuance of a preliminary injunction on the grounds that it provides an order which can be reviewed. However, the Arbitrator believes that the likelihood of UFCW's success on the merits and the potential for irreparable injury provides sound and independent grounds for issuing the injunction. Further, the consideration of assuring prompt judicial review is significant because both parties by their actions have evidenced a strong preference for pursuing that course. Both parties will be better off if this matter is resolved sooner rather than later, regardless of the final outcome. To that end, and because UFCW and its members are suffering irreparable injuries despite the Arbitrator's findings that UFCW should prevail, an order for interim injunctive relief, largely as suggested by UFCW, will issue.

The requested order that Morrell be required to establish an escrow account to cover estimated back pay is not included. That request goes beyond what UFCW has supported by evidence which would justify such order. The Arbitrator is in agreement with the position taken by Morrell in its December 30 response that the requested order is interim in nature, and that the exact amount of

monies owing and other issues, including mitigation, are still to be addressed. The Arbitrator's retention of jurisdiction is designed to resolve such disputes that may arise.

Dated: 31st day of December, 1988

/s/ William E. Rentfro
WILLIAM E. RENTFRO
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order Granting UFCW's Motion for Further Relief was mailed, via Federal Express, on December 31, 1988 to the following counsels of record:

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/s/ William E. Rentfro
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